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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY, PETITIONER,

vs.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petition for certiorari filed March 21, 1957.

Certiorari granted May 6, 1957.

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY, PETITIONER,

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THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 5436

HENRY T. McKINNEY,
Appellant,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,
Appellees.

Statement of Points on Appeal—Filed July 9, 1956

The points upon which Appellant will rely are:

1. The District Court erred in concluding that Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459(c), did not entitle appellant, upon his return from military service, to seniority in the advance position he then received from the date he would have obtained that advanced position had he remained in the continuous employ of the appellee employer.

2. The District Court erred in concluding that appellant was not entitled, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, to a seniority date in Group I Seniority Classification of either September 8 or September 10, 1952.

3. The District Court erred in dismissing appellant's complaint on the ground that it failed to state a claim upon which relief could be granted against the appellee employer.

FRANK D. McSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant United States Attorney,
Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 3945, Civ.

HENRY T. McKINNEY,

Plaintiff,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,

Defendants.

Complaint—Filed June 3, 1955

Comes now the plaintiff, Henry T. McKinney, appearing by Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, acting by direction and on authority of the Attorney General and for complaint against the defendant, The Missouri-Kansas-Texas Railroad Company, alleges and states:

I. That this Court has jurisdiction by reason of this being an action brought under 50 U. S. C. A. Appendix 459; that the plaintiff resides in Muskogee, Oklahoma; that the defendant is a corporation doing business in the Eastern District of Oklahoma.

II. That on or about August 1, 1925, the defendant and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees entered into an agreement known as "Agreement between the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, and all that class of clerical, office, station and storehouse employees thereon represented by Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees"; that said agreement was effective from August 1, 1925, and thereafter and continues in effect at the present date. A true copy of said agreement is attached hereto marked Exhibit "A" and made a part of this complaint.

III. That plaintiff is an affected employee within the meaning of Rule 1 of said Agreement, and that plaintiff was an employee of the defendant on September 25, 1950, in the capacity of Relief Clerk-Chief Caller, which was a position other than temporary and was a position within Group 2 Classification of said Agreement.

IV. That plaintiff left said employment for the purpose of training and service in the Armed Forces of the United States on September 26, 1950, and continued to serve therein until separated therefrom on September 25, 1952; that at the time of such separation, plaintiff received a certificate showing that he had satisfactorily completed his period of training and service. A true copy of said certificate is attached hereto, marked Exhibit "B" and made a part of this complaint.

V. That under 50 U. S. C. A. Appendix 459, plaintiff is considered as having been on leave of absence during his period of training and service; that under Rule 15 of said agreement, an employee returning to defendant's employ after a leave of absence may return to his former position or may exercise seniority rights to any position bulletined during his absence; that under Rule 1(3)(A) of said agreement, employees in Group 2 Classification are entitled to preference over non-employees in the assignment to positions in Group 1; that during plaintiff's absence, a Group 1 position of Bill Clerk was bulletined by the defendant at the Muskogee Freight Station on September 8, 1952, in accordance with Rule 10 of said Agreement; that one R. B. Fabian, a non-employee, was assigned to that position on September 15, 1952; that during plaintiff's absence a Group 1 position of Assistant Cashier was bulletined by the defendant at the Muskogee Freight Station on September 10, 1952, in accordance with Rule 10 of said Agreement; that one G. B. McCuan, a non-employee, was assigned to that position on September 22, 1952; that plaintiff was unable to file an application for either of said positions by reason of his absence for the purpose of training and service; that plaintiff was, therefore, at the time of his return to defendant's employ, entitled to exercise his seniority rights and place himself in the position of Bill Clerk

or in the position of Assistant Cashier. in accordance with Rule 1(3)(A) of said Agreement.

VI. That plaintiff, on October 1, 1952, made application to defendant for reemployment and was accordingly reemployed on August 2, 1952, and was permitted to place himself in the position of Assistant Cashier; that plaintiff was assigned a seniority date in Group 2 of October 7, 1952; that plaintiff duly protested that said seniority date was incorrect; that said seniority is, in fact, incorrect; that plaintiff's seniority date should be September 10, 1952, the date on which the position of Assistant Cashier was bulletined, or September 8, 1952, the date on which the position of Bill Clerk was bulletined.

VII. That plaintiff continued to serve in the position of Assistant Cashier until said position was abolished on September 4, 1953; that plaintiff, on September 2, 1953, duly requested that he be permitted to exercise his seniority rights and place himself in the position of Bill Clerk in accordance with Rule 23 of said Agreement; that plaintiff's request was rejected by the defendant; that plaintiff duly protested said rejection; that said rejection was due solely to the fact that plaintiff's incorrectly signed seniority date of October 7, 1952, made him a junior employee to R. B. Fabian, whose seniority date was September 15, 1952; that if plaintiff had been assigned a correct seniority date of September 10, 1952, or September 8, 1952, plaintiff would have been a senior employee to R. B. Fabian and plaintiff's request would not have been rejected; that plaintiff has at all times since September 4, 1953, been qualified to perform the duties of Bill Clerk.

VIII. That after plaintiff's request was rejected, plaintiff was reemployed as Relief Clerk Chief Caller and has been retained in that position since September 5, 1953; that plaintiff has been damaged in the sum of $10.08 per week since September 5, 1953, for earnings lost by reason of defendant's wrongful refusal to permit plaintiff to place himself in the position of the Bill Clerk.

Wherefore, plaintiff prays this Honorable Court to order defendant to assign plaintiff a seniority date of September 10, 1952, or September 8, 1952, in accordance with Para-

graph VI of this Complaint, and to permit plaintiff to place himself in the position of Bill Clerk, and to award plaintiff damages in the amount of $10.08 per week from September 5, 1953, until such time as plaintiff is permitted to place himself in the position of Bill Clerk, and for such retirement, sickness, and unemployment benefits and credits as plaintiff would have been entitled to in Group 1, and for such other benefits and relief to which plaintiff may be entitled, and for the United States of America to recover the costs of this action.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant United States Attorney.

Exhibit A to Complaint

Agreement between the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas and all that class of clerical, office, station and storehouse employees thereon represented by Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Effective August 1, 1925 with Revisions to December 1, 1951.

Hours of Service and Working Conditions Governing Employees Named Herein.

Rates of Pay. * * *

Employes Affected—Rule 1. * * *

(1) Clerks, Sub-Formen, Assistant Foremen, Sub-Storekeepers, City Ticket Agents (Traffic Department).

Qualifications—Clerks-Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, dictating letters, vouchers, bills, statements, reports, and similar work, including employes who examine or verify such work, also typists, comptometer operators, and calculating machine operators, shall be designated as clerks.

(2) Other office and station employes, such as office boys, messengers, helpers, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, elevator operators, ticket and way-bill assorters, machine operators, employes operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers.

(3) Station, platform, warehouse, transfer, dock, store room, stock room and team track freight or material handlers or truckers, and others similarly employed; car sealers, scalers, fruit and perishable inspectors, stowers, stevedores, breakouts, loaders, locators, coopers, and other similarly employed; and laborers employed in and around stations, offices, storehouses, and warehouses.

(A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1). * * *

(C) Seniority of employes will be restricted to the respective group in which employed, except that seniority accumulated in groups two (2) or three (3) will be recognized in reduction of forces in the event employes holding seniority in group two (2) or three (3) positions, are laid off account of reduction in forces, such employes will be privileged to exercise their seniority in groups from which promoted. * * *

SENIORITY

Seniority Datum—Rule 4.—Seniority begins at the time the employe's pay starts in the respective branch or class of service and on the seniority district on which employed, transferred, or promoted, and when employes are assigned to positions as provided for in Rule 10, of the agreement, or other rules which presuppose regular employment. * * *

Bulletin—Rule 10.—New positions or vacancies will be promptly bulletined in places accesible to all employes affected, for a period of five (5) days in the seniority district where they occur. Bulletin to show location, title, hours of service, and rate of pay. Employes desiring such positions will file their application with the designated official within that time, the name of the successful applicant will be posted for a period of five (5) days where the position was bulletined and a copy furnished to interested chairmen. This rule does not apply to employes in group three (3) of Rule 1.

Under this rule positions should be bulletined for bid not later than three (3) days after position has been vacated by regularly assigned employe.

Physical assignment to positions which have been bulletined for bid will be made not later than three (3) days after the expiration of the time limit under this rule, except where longer period is required extension will be made by agreement between the carrier and local or division chairman, representatives of employes. * * *

Bidding After Absence—Rule 15.—An employe returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner. * * *

Positions Abolished—Rule 23.—Employes whose positions are abolished may exercise their seniority rights over junior employes, and other employes affected may exercise their seniority in the same manner, subject to the provisions of Rules five (5) and eighteen (18).

Employes who exercise seniority account of reduction in force or positions abolished will within seven (7) days from such date notify the supervising officer of their desire to exercise their seniority on a position occupied by a junior employe. The supervising officer will within three (3) days either accept or reject the application of the employe desiring to exercise seniority.

Employes whose application to exercise seniority has been rejected will within three (3) days designate his

second choice, and his application will be considered in accordance with the provisions of these rules.

Employes whose applications to exercise seniority have been rejected may appeal in accordance with Rule 31 of the agreement.

An employes whose application to exercise seniority has been rejected and who designates a second choice does not lose the right to appeal as provided for in Rule 31.

Any employe whose position has been abolished, or who is displaced as result of force reduction, desiring leave of absence, will, prior to being granted a leave and within seven days after abolishment or displacement, designate in writing the position upon which he desires to place himself. The employing official, will upon such notification notify the employe affected. The employe affected may if he so desires exercise seniority in accordance with prevailing rules, or he may retain the position held by him during the time that the employe granted the leave is absent from the position. Upon return of employe granted the leave, the employe displaced may exercise seniority.

In the event the employe granted the leave fails to return at expiration of same, the employe holding the position will be considered as having never been displaced. * * *

DISCIPLINE AND GRIEVANCES

Investigation—Rule 27.—An employe who has been in the service more than sixty (60) days shall not be disciplined or dismissed without just cause and upon written request made upon the disciplining officer or agent, within seven (7) days from the date of notification of discipline or dismissal, shall be given an investigation, at which investigation he may have a representative of his choice. He may, however, be held out of service pending such investigation. The investigation shall be held within seven (7) days of the date such request is received. A decision will be rendered within seven (7) days after the completion of the investigation.

Hearing—Rule 28.—An employe dissatified with the decision rendered in connection with the investigation shall

have a fair and impartial hearing before the next proper officer, provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days after such request is received and a decision rendered within seven (7) days of the completion of hearing.

Appeal—Rule 29.—If an appeal is taken from this hearing it must be filed with the next higher official, and a copy furnished the official whose decision is appealed within seven (7) days after the date of the decision.

Further Appeal—Rule 30.—If further appeal is taken it must be filed as provided in Rule twenty-nine (29), within twenty (20) days of date of the decision appealed. On such appeal decision shall be rendered as promptly as possible.

Grievances—Rule 31.—An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for above, if written request is made to his immediate superior within seven (7) days of the cause for complaint.

Representation—Rule 32.—At the hearing, or on the appeal, the employe may be assisted by one or more representatives of his choice.

Right of Appeal—Rule 33.—The right of appeal by employes or their representatives in the regular order of succession, and in the manner prescribed, up to and inclusive of the highest official designated by the Railway, to whom appeal may be made, is hereby established. * * *

IN UNITED STATES DISTRICT COURT

Amendment to Complaint—Filed September 12, 1955

Comes now the plaintiff, Henry T. McKinney, by Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, and as a matter of course in accordance with Rule 15(a), Federal Rules of Civil Procedure, amends Paragraph VI of the Complaint in this action so that the said Paragraph VI will read as follows, to-wit:

VI. That plaintiff, on October 1, 1952, made application to defendant for reemployment and was accordingly re-

employed on October 7, 1952, and was permitted to place himself in the position of Assistant Cashier; that plaintiff was assigned a seniority date in Group I of October 7, 1952; that plaintiff duly protested that said seniority date was incorrect; that said seniority is, in fact, incorrect; that plaintiff's seniority date should be September 10, 1952, the date on which the position of Assistant Cashier was bulletined, or September 8, 1952, the date on which the position of Bill Clerk was bulletined.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed Sept. 12, 1955.

IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed June 23, 1955

Comes now the defendant, Missouri-Kansas-Texas Railroad Company, and moves the Court to dismiss this action, and as grounds for said motion would respectfully show:

I. The Court lacks jurisdiction over the subject matter of this action because, although plaintiff's complaint alleges that jurisdiction is predicated on a question arising under Section 50 U. S. C. A. Appendix 459, the complaint shows on its face that no question is presented which arises under the laws of the United States, or otherwise within the jurisdiction of the Court. The complaint shows on its face that upon entering military service, plaintiff held seniority in Group 2, and under the provisions of Rule 1(3)(A) of the labor agreement mentioned in numerical paragraph II of the complaint, promotion to Group 1 is based on fitness and ability rather than upon seniority, and plaintiff had and has no rights to re-employment except in Group 2. The complaint shows on its face that upon being relieved from active duty and military service, the plaintiff was re-employed by defendant, and was granted all re-employment rights to which he was entitled under said act of Congress. Plaintiff's complaint shows that his cause of action, if any, is not under said act

of Congress or for its violation, but is for breach of contract, which action is within the exclusive primary jurisdiction of the Third Division of the National Railroad Adjustment Board, 45 U. S. C. A. 153, First (H) (I) (J) (M) (N) (O) (P).

II. The complaint fails to state a claim upon which relief can be granted against the defendant, in that:

(a) The seniority rights of plaintiff are fixed and determined under the labor agreement mentioned in numerical paragraph II of the complaint. Plaintiff's seniority status and date is controlled by Rule 1(3)(C) and Rule 4 of said agreement, and is and was correctly determined as September 1, 1949, in Group 2, and October 7, 1952, in Group 1.

(b) That R. F. Fabian has a seniority status superior to that of the plaintiff, and is not subject to displacement by plaintiff.

III. Plaintiff has failed to join indispensable parties, namely R. F. Fabian and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, who should be parties to this action to the end the rights of all essential parties may be determined, and final decision herein will be binding on all parties who could or may be affected thereby.

That it appears from the complaint that R. F. Fabian, who resides at 712 North "F" Street, Muskogee, Oklahoma, now has a seniority status superior to that of the plaintiff. That R. F. Fabian is a real party in interest, and a necessary and indispensable party to this cause, for the reason the determination of this cause in favor of the plaintiff would deprive R. F. Fabian of his seniority status superior to plaintiff, and prejudice his rights.

That it appears from the complaint that Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes is a real party in interest, and an indispensable and necessary party to this cause, for the reason said organization negotiated the labor agreement mentioned in the complaint, is responsible to all its members, including plaintiff, for the protection and enforce-

ment of rights thereunder, and said agreement will, of necessity be interpreted and construed in deciding this cause.

DAN M. WELCH,
Attorney for Defendant.

Filed June 23, 1955.

IN UNITED STATES DISTRICT COURT

Motion of Brotherhood to Intervene—Filed August 19, 1955

Comes now the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and under Rule 24(a) of the Federal Rules of Civil Procedure does move the Court to grant it permission to intervene in this action for the reason that this applicant has a real and substantial interest in the subject matter of this proceeding and the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in this action. For grounds for this motion your applicant states the following:

1. The applicant is an unincorporated voluntary association with its principal office and place of business in the City of Cincinnati, State of Ohio. It is a national railway labor organization, properly organized in accordance with the provisions of the Railway Labor Act, 45 U. S. C. A. 153 *et seq.*

2. Your applicant is the properly and lawfully designated collective bargaining representative of the class of clerical, office, station and storehouse employees of the Missouri-Kansas-Texas Railroad Company of Texas. Said clerical, office, station and storehouse employees are members of the said Brotherhood. Your applicant heretofore has made an agreement with respect to hours, rates of pay, seniority and other conditions of employment concerning the class of clerical, office, station and storehouse employees of the defendant railroad on August 1, 1925, which agreement remains extant and binding between the parties, together with such miscellaneous amendments as have been made since that date. This applicant, together with its many members and the individuals who constitute the

class of clerical, office, station and storehouse employees on the defendant railroad, have a real and substantial interest in the enforcement, application, operation and proper interpretation by properly designated authorities and tribunals of the aforementioned agreement as amended, all as provided for by law under the terms and provisions of the Railway Labor Act, 45 U. S. C. A. 151. This applicant is an essential and indispensable, necessary and required party herein and a real party in interest.

3. The complaint purports to state a cause of action which involves a dispute growing out of a grievance and out of the interpretation and application of said agreement and requires interpretation and adjudication of the rights of the plaintiff and of others under the terms and provisions of the aforementioned contract. *Inter alia* the complaint requires that this Court consider, interpret and adjudicate said agreement, and more particularly Rule 1(3)(a), Rule 10, Rule 23, and other sections of said agreement. Said petition requires that this Court make a determination with respect to the seniority status and other rights of the plaintiff, and, therefore, the rights of the applicant and of other members of the class of clerical, office, station and storehouse employees, not parties herein, would be involved and are involved. Furthermore, your applicant respectfully submits that the interpretation of said agreement as sought by the plaintiff is incorrect, improper and unlawful.

4. Your applicant respectfully submits that this Court lacks jurisdiction over the subject matter and the parties herein, that the complaint does not state a cause of action upon which relief can be granted under 50 U. S. C. A. or otherwise, that the subject matter of this action lies within the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, 45 U. S. C. A. 151 *et seq.*, and accordingly for those reasons this cause should be dismissed. It is the prayer of your applicant that it be permitted to file a motion to dismiss in this action and fully to intervene under Rule 24(a) of the Federal Rules of Civil Procedure.

Wherefore, the premises considered, your applicant prays that it be permitted to intervene herein and to file its motion to dismiss in the form attached hereto.

CARROLL J. DONOHUE,
SALKEY & JONES,
A. CAMP BONDS,
Banker, Bonds & Wilcoxen.

Filed Aug. 19, 1955.

IN UNITED STATES DISTRICT COURT

Clerk's Note Re Intervention—September 1, 1955

Clerk's Note: On September 1, 1955 the court entered an order as follows, to-wit: "Entering Order permitting the Brotherhood of Railway and Steamship Clerks, etc. to intervene herein." (Rice)

No formal journal entry was ever prepared and presented to the Court for signature and filing in the case.

IN UNITED STATES DISTRICT COURT

Motion of Brotherhood to Dismiss—Filed September 1, 1955

Comes now the intervenor, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and respectfully moves the Court to dismiss this action for the following reasons:

1. Plaintiff's complaint reveals on its face that this Court lacks jurisdiction over the alleged and purported subject matter thereof and described therein because:

a) The alleged matter in controversy does not arise under the constitution and laws of the United States;

b) Exclusive jurisdiction to adjudicate the matters described in plaintiff's complaint is vested by the Railway Labor Act, 45 U. S. C. A., Section 151 *et seq.*, in the National Railroad Adjustment Board, the awards of which may under said Railway Labor Act be reviewed exclusively in statutory suits for enforcement and exclusively in certain District Courts of the United States, all as is provided and designated in said Railway Labor Act.

2. The plaintiff's complaint states no cause of action under 50 U. S. C. A., Appendix 459, and this action is improperly purportedly brought thereunder.

3. The Court lacks jurisdiction over the parties herein.

4. R. F. Fahian, a real party in interest and a necessary and indispensable party to this cause whose rights would be prejudiced and determined by a judgment of this Court herein, has not been made a party to this action.

5. With respect to plaintiff's purported claim for damages and other relief, it is apparent on the face of plaintiff's complaint that plaintiff has failed to state a claim upon which relief can be granted and that plaintiff has failed to state or plead facts indicating liability of the defendant to plaintiff, or any legally recognizable damage sustained by plaintiff which is recoverable by plaintiff, or any legally recognizable right to relief.

Wherefore, the premises considered, this defendant prays that plaintiff's complaint and his purported cause of action be dismissed.

CARROLL J. DONOHUE,
SALKEY & JONES,
A. CAMP BONDS,
Banker, Bonds & Wilcoxen.

[Verified.]
Filed Sept. 1, 1955.

IN UNITED STATES DISTRICT COURT

Order Sustaining Motion to Dismiss—March 14, 1956

On this the 14th day of March, 1956, there comes on for consideration the motion to dismiss filed herein on behalf of the defendant and also on behalf of the intervenor. Said motions have been presented by written briefs, and each of said motions asks for dismissal upon three separate grounds: (1) That the Court lacks jurisdiction over the subject matter, (2) That the plaintiff has failed to join indispensable parties, (3) And that the complaint fails to state a claim upon which relief can be granted against the defendant.

After consideration of the briefs filed herein and the law as presented by the parties, the Court is of the opinion that the motions should be sustained, not for lack of jurisdiction nor for a failure to join indispensable parties but for the reason that plaintiff's complaint fails to state a claim for which relief can be granted against the defendant.

It is therefore ordered, adjudged, and decreed that the motion of the defendant, Missouri-Kansas-Texas Railroad Company, and the motion of the intervenor, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, be and the same are sustained and plaintiff's complaint is dismissed.

EUGENE RICE, *Judge.*

Filed March 14, 1956.

IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed April 10, 1956

Notice is hereby given that Henry T. McKinney, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order Sustaining Motion to Dismiss for failure to state a claim upon which relief can be granted against the defendant, which order was entered in this action on March 14, 1956.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed April 10, 1956.

IN UNITED STATES DISTRICT COURT

Note Re Order Extending Time for Docketing

[By order of May 10, 1956, the time for docketing the cause in the Court of Appeals was extended to July 9, 1956.]

Clerk's Certificate to foregoing transcript (omitted in printing).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5436—November Term, 1956.

HENRY T. MCKINNEY,

Appellant,

vs.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,

Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma

Opinion—December 22, 1956

Alan S. Rosenthal (George Cochran Doub, Ass't Attorney General, Frank D. McSherry, United States Attorney, and Samuel D. Slade were with him on the brief) for Appellant.

Dan M. Welch and Carroll J. Donahue (Wayne R. Howell, M. E. Clinton, Salkey & Jones, and Banker and Bonds were them on the brief) for Appellees.

Before BRATTON, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

Henry T. McKinney, an honorably discharged veteran, brought this action against the Missouri-Kansas-Texas Railroad Company to enforce alleged employment rights under § 9 of the Universal Military Training and Service

Act of 1951, 50 U. S. C. Appendix § 459. The Union was granted leave to intervene on its own motion. He appeals from the judgment of the Court dismissing his complaint on the grounds that it failed to state a claim upon which relief could be granted.

In his complaint McKinney alleged a collective bargaining agreement dated August 1, 1925, was still in effect, between M-K-T and the Union, of which he was a member; it was claimed that this agreement gave him rights for advancement upon his return from the service under the interpretation of the Act. The contract provides for three classes of employees, Groups 1, 2 and 3. Each Group has its own seniority schedule. At the time of his induction into the service McKinney was an employee of Group 2. Rule 15 of the contract provides that a worker returning after a leave of absence may return to his former position or exercise seniority rights to any position "bulletined" during his absence. Rule 1(3)(A) provides that employees in Group 2 are entitled to promotions to Group 1 in preference over non-employees, "based upon fitness and ability." Rule 4 provides that upon such promotion seniority begins at the time the employee's pay starts in the respective class of service when employees are assigned to positions as provided for in Rule 10. It is by Rule 10 procedure that McKinney claims he is being denied his rights under the Act. There it is provided that vacancies will be bulletined in places easily accessible to employees and after applications are received the name of the successful applicant would be posted. Rules 1(3)(C) and 23 provide that within the respective Groups seniority might be exercised by employees whose jobs had been abolished. Grievances regarding rejection of seniority demands in that event were provided for by appeals.

On September 8 and 10, 1952, while McKinney was still in the service two positions in Group 1 were bulletined. The first was the position of bill clerk, given to R. B. Fabian on September 15, 1952, and the other was assistant cashier, given to G. B. McCuan on September 22, 1952. Both of these men were non-employees. Upon his discharge from the military on September 25, 1952, McKinney applied for re-employment and was rehired on October 2,

1952, as assistant cashier in Group 1, and was given C. B. McCuan's job.

It is McKinney's contention that when he returned he was entitled to exercise his seniority rights and place himself in the position of bill clerk, the position held by Fabian, in accordance with Rule 1(3)(A) of the contract. When he was given C. B. McCuan's position his seniority in Group 1 was dated as of October 7, 1952. He protested claiming that his seniority should be dated either September 8 or 10, 1952, when the vacancies were first bulletined. He continued to serve as assistant cashier, however, under the protested arrangement until the job was abolished on September 4, 1953. Thereupon he reasserted his contention that he deserved higher seniority than R. B. Fabian and sought to "bump" him on that basis, and this was denied by M-K-T on the basis of his earlier assigned seniority date in Group 1. He was reassigned to his position in Group 2 held prior to his induction into the service and has held it since September 5, 1953.

The appellee Union challenges the jurisdiction of the district court on two grounds. It is urged that in any event the National Railroad Adjustment Board was vested with primary exclusive jurisdiction [1] of the controversy between these parties; that appellant McKinney could not bypass the National Railroad Adjustment Board and seek relief in the federal district court. The Railway Labor Act [2] vests in the National Railroad Adjustment Board jurisdiction to interpret agreements and adjudicate issues between railroads and their employees. The National Railroad Adjustment Board is given broad jurisdiction to interpret agreements and adjudicate issues between railroads and their employees with appropriate and comprehensive administrative procedure provided for the discharge of such functions. But Section 9(d) of the Universal Military Training and Service Act, *supra*, expressly gives to any qualified and returning serviceman the right to insti-

[1] In *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, in footnote 7 the Court states: "Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.

[2] 48 Stat. 1185, 45 U. S. C. A. § 151, *et seq.*

tute a proceeding in the United States Courts to require a former employer to comply with the provisions of the Act regarding preservation of re-employment and seniority rights. The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. The Railway Labor Act is general legislation dealing with labor disputes as such. The Universal Military Training and Service Act is a specific statute for the benefit of all veterans honorably discharged and regards itself with disputes arising from such status upon their return. Being a specific statute for the resolution of specific grievances, it must control.

It is next contended by the Union that the Court lacked jurisdiction because of the absence of an indispensable party, Fabian. It is contended that Fabian's rights are involved in this controversy and that, therefore, he is indispensable to a final adjudication. The 1951 Act, however, specifically provides "That only the employer shall be deemed a necessary party respondent to any such action." Under this clear provision of the statute a controversy of this kind is solely between the returned veteran and the former employer and no one else need be joined as a party litigant.[3] The Union places strong reliance on the decision of our Court in *Johnson* v. *Interstate Transit Lines*, 163 F. 2d 125. We did hold in that case that the other interested employees were indispensable parties. It is sufficient however to say that case is not controlling or in conflict with what we now hold, because it arises under the Act of 1940 which did not contain the provision of the 1951 Act quoted above or any similar provision.

On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered

[3] *United States* v. *Missouri-Kansas-Texas Railroad Co.*, 171 F. 2d 961; *Connor* v. *Pennsylvania Railroad Company*, 177 F. 2d 854.

the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service.[4] This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.

To determine where he would be had he not entered the service and had he remained with the company, we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service.[5] The collective bargaining agreement classifies the employees into three Groups. Under the agreement the rights of the employees predicated upon seniority are expressly confined to members within each Group, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however under a determination that the employee seeking such advancement is fitted and qualified for such position. Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service.

Under Rule 4 McKinney's seniority rights in Group 1 began when his pay started in that Group. His pay no dobut started on October 2, 1952, when he was rehired. It may be that his seniority in that Group began on that day rather than on October 7 when it was made to begin. It may also be that he was not entitled to "bump" McCuan because it would seem that his seniority was junior to that of McCuan's. But this was not an issue in the case. It is

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[4] *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278; *Fishgold* v. *Sullivan Drydock Repair Corp.*, 328 U. S. 275; *Meehan* v. *National Supply Co.*, 160 F. 2d 346; *Hewitt* v. *System Federation*, 161 F. 2d 545.

[5] *Trailmobile Company* v. *Whirls*, 331 U. S. 40.

apparent from what has been said that his seniority rights in Group 1 were in any event junior to those of Fabian and he was therefore not entitled to "bump" him when his job in Group 1 was abolished. The conclusion we have reached on the main issue of the case makes unnecessary consideration of the question of laches.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

Judgment—December 22, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Clerk's Certificate to foregoing Transcript (omitted in printing).

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari. Filed May 6, 1957.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1956

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Henry T. McKinney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on December 22, 1956.[1]

OPINIONS BELOW

The United States District Court for the Eastern District of Oklahoma rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, pp. 18-23) is reported at 240 F. 2d 8.

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[1] The Department of Justice appears for petitioner pursuant to the provisions of Section 9(d) of the Universal Military Training and Service Act of 1951, *infra*, pp. 16-17. Under the same provision, petitioner was also represented in both courts below by the Department of Justice.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (App. 23-24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he would have obtained it had he remained in the continuous employment of the respondent.

STATUTE INVOLVED

The relevant provisions of Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U.S.C. App. 459, are set forth in Appendix A, pp. 15-17, *infra*.

STATEMENT

This action was brought by petitioner to enforce reemployment rights under Section 9 of the Universal Military Training and Service Act of 1951, *infra*, pp. 15-17. Both courts below held that petitioner's complaint failed to state a claim upon which relief could be granted. The allegations of the complaint, and the proceedings below, may be summarized as follows:

On September 25, 1950, petitioner was employed by the respondent railroad as a Relief Clerk—Chief Caller (R. 3). This position came within what was termed the Group 2 Seniority Classification in the applicable collective bargaining agreement between the railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 3).

On September 26, 1950, petitioner was inducted into the military service (R. 3). On September 25, 1952, he received an honorable discharge therefrom (R. 3). On October 1, 1952, he applied for reemployment with the railroad (R. 4, 10).

On September 8 and 10, 1952, respectively—*i.e.* while petitioner was still in the military service—two positions in Group 1 Seniority Classification were bulletined, pursuant to Rule 10 of the collective bargaining agreement (R. 3). The first of these positions was that of Bill Clerk and was filled on September 15, 1952 (R. 3). The second was that of Assistant Cashier and was filled on September 22, 1952 (R. 3). Neither of these new employees was in the employ of the railroad prior to their acquisition of these positions (R. 3).

Under Rule 15 of the agreement, an employee returning after a leave of absence had the option of either (1) resuming his former position or (2) exercising seniority rights to obtain any position bulletined in his absence (R. 7). And Rule 1(3)(A) provided that employees in Group 2 Seniority Classification were entitled to preference over non-employees in the assignment to positions in Group 1, "based upon fitness and ability" (R. 6).

Upon petitioner's application for reinstatement, he was permitted to replace the man in the Assistant Cashier position and was given a seniority date in Group 1 of October 7, 1952 (R. 10). Petitioner unsuccessfully protested this seniority date on the ground that he was entitled to a Group 1 seniority date of either September 8, 1952 (when the Bill Clerk position was bulletined), or September 10, 1952 (when the Assistant Cashier position was bulletined) (R. 10).

Petitioner served in the position of Assistant Cashier until September 4, 1953, when that position was abolished (R. 4). Two days prior thereto, having received notice of the prospective abolishment, he requested that he be placed in the Bill Clerk position still occupied by the new employee (R. 4). His claim was that, since his seniority in Group 1 should have been computed from September 8 or September 10, 1952, he was senior to the man holding the position (whose seniority date was September 15) and was thus entitled to displace him (R. 4).

Petitioner's request was rejected by the railroad on the sole ground that he had been assigned a seniority date of October 7, 1952, and, as a consequence, was junior to the incumbent (R. 4). Following an unsuccessful protest of the rejection, petitioner was placed, on September 5, 1953, in a Group 2 Relief Clerk—Chief Caller position which paid $10.08 per week less than the Bill Clerk position (R. 4).

On June 3, 1955, petitioner filed his complaint in the District Court under Section 9 of the Universal Military Training and Service Act of 1951, App. A, *infra*, pp. 15-17 (R. 2-5). The relief sought was an order directing the railroad to assign petitioner a seniority date in Group 1 of either September 8 or September 10, 1952 and to place him in the position of Bill Clerk, as well as to award damages (R. 4-5).

Both the railroad and the union, which intervened as a party defendant, filed motions to dismiss the complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) failure to join an indispensable party; and (3) failure to state a claim upon which relief could be granted (R. 10-12, 14-15). On March 14,

1956, the District Court granted the motions on the third ground alone, expressly rejecting in its order the two other grounds (R. 15-16).

The Court of Appeals affirmed (App., *infra*, pp. 18-23). It held, in effect, that it was entirely irrelevant whether, as alleged, petitioner would have obtained Group 1 seniority as of September 8 or 10, 1952, had his military service not intervened. The court deemed the critical consideration to be, instead, that, had the Group 1 positions become available while petitioner was in the employ of the railroad, he would not have had "the absolute right to demand either of these positions over the non-employee applicants [but] * * * could have demanded them only after a determination of fitness and qualification" (App., infra, p. 23. In the court's view, because of this factor alone, the governing statute afforded petitioner no protection whatsoever with respect to seniority in Group 1; the consequence was that, when upon his return from service he immediately qualified for and was promoted to the higher classification, he was not entitled as a matter of statutory right to have his seniority in that classification computed from the date he allegedly would have so qualified—and been promoted—had he remained in respondent's continuous employ (App., *infra*, p. 23). In this connection the court expressed its belief that Section 9 of the Act encompasses "only such established seniority rights as [petitioner] had when he entered the service" (App., *infra*, p. 23).[2]

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[2] The Court of Appeals, as had the District Court, rejected respondents' defenses that there was no jurisdiction over the subject matter and that there had been a failure to join an indispensable party. We think that, for the reasons stated in the Court of Appeals' opinion (App. B, *infra*, pp. 20-22), that rejection was correct.

REASONS FOR GRANTING THE WRIT

By this action, petitioner invokes Section 9 of the Universal Military Training and Service Act to require his employer to grant him that seniority in the position he qualified for and obtained upon his return from military service which he would have had but for the intervention of his service.[3] In affirming the dismissal of petitioner's complaint for failure to state a claim upon which relief could be granted, the Court of Appeals has read the re-employment provisions of the Act in a manner which (1) is irreconcilable with the express statutory terms, (2) conflicts with the interpretation given by this Court and several courts of appeals to identical provisions in the Selective Training and Service Act of 1940, and (3) has the effect of substantially vitiating the force of Section 9. For these reasons, and also because the continuation of the Selective Service program renders the question of the scope of the statutory protection afforded the returning veteran in his civilian employment one of recurring importance, review by this Court is warranted.

1. Section 9(c)(1) of the Universal Military Training and Service Act, *infra*, p. 16, contains the congressional mandate, first appearing in Section 8(c) of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U.S.C. App. (1946 ed.) 308, that the returning veteran is to be restored to his job "without loss of seniority". In *Oakley* v. *Louisville & N. R. Co.*, 338 U.S. 278, which arose under the 1940 Act, this

[3] There can be no question that, had petitioner been given the Group 1 seniority to which he claims statutory entitlement, Rule 23 of the collective bargaining agreement (R. 7) would have enabled him to displace the man in the Bill Clerk position when the Assistant Cashier position was abolished.

Court held that this requirement means that the returning veteran is entitled to restoration (338 U.S. at 283):

> * * * not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable *to the position which he would have held, if he had remained continuously in his civilian employment.* [Emphasis added.]

And this "continuous employment" test was reiterated in slightly different words no less than five times in other portions of the opinion (338 U.S. at 279, 282, 284, 285).

The *Oakley* holding followed logically from the Court's earlier interpretations of the 1940 Act in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U.S. 40. In both of these cases, the Court stated unequivocally that the purpose of Section 8(c) of the Selective Training and Service Act of 1940 was to protect veterans against being penalized for time spent in the military service.[4]

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[4] In the *Fishgold* case, the Court noted that the Act was designed to insure that the employee "who was called to the colors [would not] be penalized on his return by reason of his absence from his civilian job" (328 U.S. at 284) and that "Congress recognized in the Act the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence" (328 U.S. at 288). Thus, the Court concluded, the veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * He acquires not only the same seniority he had; his service in the armed

In enacting the Selective Service Act of 1948, which in 1951 was continued, with amendments not applicable here, as the Universal Military Training and Service Act, Congress carried over into Section 9(c)(1) the provisions of Section 8(c) of the 1940 Act.[5] Additionally, it codified the "escalator principle"; Section 9(c)(2) provides that:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such *status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.* [Emphasis added.][6]

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services is counted as service in the plant so that he does not lose ground by reason of his absence" (328 U.S. at 284-285).

In the *Trailmobile* case, it was again stated that the "restored veteran * * * could not be disadvantaged by his service to the nation" and was not to be penalized upon his return because of his absence from his civilian job (331 U.S. at 58). The standing of the restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also that [which] would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U.S. at 56).

[5] No important substantive changes with respect to reemployment were made in the 1948 Act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2nd Sess., p. 15.

[6] The Senate Report on the 1948 Act discusses Section 9(c)(2) in terms of a "statement of policy regarding application of the 'escalator principle' " (S. Rep. 1268, 80th Cong., 2d Sess., p. 16), an

2. If effect is given to the "escalator principle", as enunciated in *Oakley* and codified in Section 9(c)(2) of the 1951 Act, it inescapably follows, we submit, that petitioner's complaint states a cause of action under that Act. In the final analysis, petitioner seeks nothing more nor less than the "status in his employment [that] he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." The complaint alleges that, had petitioner been in the respondent railroad's employ when the two Group 1 positions became available, he would have been entitled to preference over the non-employee applicants. As the court below itself conceded (App., *infra*, p. 23), that preference would have entitled petitioner to demand one of the positions so long as it was objectively determined that he was qualified. The action having been dismissed without a trial, there is, of course, nothing in the record to suggest that petitioner was not as fully qualified to perform the duties of the Group 1 positions as the non-employee applicants.[7]

Notwithstanding these considerations, the Tenth Circuit held the "escalator principle" inoperative here. Expressing its belief that the principle relates solely to "such established seniority rights [as the veteran]

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obvious reference to the "escalator principle" of the 1940 Act announced in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, *supra*. And the Section, of course, differs in no material respect from the statement of that principle in *Oakley* v. *Louisville & N. R. Co.*, *supra*.

[7] In this connection, it is worthy of note that, upon his return to civilian employment less than a month after the vacancies first occurred, petitioner was immediately permitted to displace one of the latter.

had when he entered the service," the court pointed to the fact that a Group 2 employee (such as petitioner was at the time of entering into the armed forces) does not have an *absolute right* under the collective bargaining agreement to promotion to Group 1 over non-employee applicants, in that it first had to be determined that he possessed the requisite ability (App., *infra*, 23).

This interpretation of the "escalator principle" cannot be reconciled with the statement of that principle by this Court and Congress. *Supra*, pp. 6-8. Further, it is inconsistent with the decision of the Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, and in direct conflict with the recent decision of the Sixth Circuit in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699, as well as with the decisions of the Seventh and District of Columbia Circuits in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579, certiorari denied, 336 U. S. 967, and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854. None of these cases was given even passing mention by the Court of Appeals. Each holds, however, that the "escalator principle" requires that a veteran who, upon his return to civilian employment, qualifies for, and is promoted to, a higher position be given the seniority in that position that he would have had had he remained continuously in his civilian employment and thus been able to qualify at an earlier date. Necessarily, each thus rejects the "absolute right" test adopted by the court below.

In the *Diehl case*, 348 U. S. 960, the collective bargaining agreement, by an amendment executed after the veteran's return, provided for a promotion to a higher seniority classification upon the completion of a specified number of days of experience in a lower

capacity. The agreement went on to stipulate that seniority in the higher classification was to be fixed by the time that the employee qualified for promotion. The veteran, on completion of the minimum term of experience after his return from service, was denied seniority over non-veterans who, because of his absence in the armed services, had completed the set period earlier. The district and circuit courts held the veteran entitled to seniority only in the position he had held when he entered the service (211 F. 2d 95). This Court reversed *per curiam* on the basis of *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, and gave the veteran the seniority he probably would have had if he had not gone into the service. In *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), the labor agreement conditioned eligibility for promotion to the higher seniority classification upon the satisfactory completion of an apprenticeship and the passing of qualifying examinations. When the veteran qualified on his return from service, he was given seniority in the higher classification only as of the date of his actual promotion. On the authority of the *Diehl* case, the Sixth Circuit held that his statutory reemployment rights had been violated in spite of the fact that he had no *right* to promotion and that meeting the qualifications merely made him *eligible*. In this connection, the court observed that other apprentices whose employment was not interrupted by military service had been promoted to the higher classification when they met the requisite qualifications—albeit as a matter of practice rather than of right.

In *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, promotion depended upon the passing of a qualifying examina-

tion, employees in a lower bracket being customarily permitted to apply in order of seniority. The agreement provided that "seniority as dispatcher [the higher position] will date from date employee passes the required examination and qualifies as dispatcher." Yet the "escalator principle" was applied by the Seventh Circuit to give a veteran seniority as though he had qualified on the date upon which the man next junior to him in the lower position had been promoted —rather than as of the date, immediately following his return, upon which he passed the qualifying examination. A similar decision was reached in *Conner* v. *Pennsylvania R. Co.*, 197 F. 2d 854 (C. A. D. C.), where under the agreement an application for promotion from a lower position was "given consideration" and the transfer made if the applicant was "deemed qualified."

The result in all of these cases would have been opposite and the veterans would have been denied the seniority sought if the "absolute right" test adopted by the court below had been followed.[8]

3. The construction given to Section 9 by the court below will seriously prejudice numerous veterans within the bounds of the Tenth Circuit because of their absence in the military service—the precise evil the Section was designed to guard against. See p. 7, *supra*. As the cases we have discussed reflect, promo-

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[8] Unlike this case, *Mann*, *Conner* and *Morris* reached the Court of Appeals following the development of a full record in the district court on the issue as to the date upon which the veteran could have qualified for promotion had he not been in the military service. Recognizing the necessity of evidence on this critical issue, petitioner here requested the Court of Appeals to remand the case to the District Court to enable him to prove the allegations of his complaint.

tion to positions in higher classifications almost always involves, not only the matter of the employee's status in the lower classification, but also the successful completion of a specified training program, the passing of an examination, or some other objective demonstration of fitness. Thus, under the "absolute right" test formulated by the court below, there will be few veterans who will be able to invoke the "escalator principle" to obtain, with respect to positions received upon their return, the seniority that they would have had had military service not prevented the earlier fulfillment of the conditions precedent to acquisition of those positions.

4. There are now pending in the district courts approximately 150 cases involving the application of the "escalator principle." We have been advised by the Bureau of Veterans' Reemployment Rights of the Department of Labor that, within the near future, an additional 90 "escalator principle" cases will be referred to the appropriate United States Attorney for the institution of legal proceedings on the veteran's behalf. In these latter cases, that Bureau has made a preliminary determination that the veteran's claim is supported by the governing statute, as interpreted by this Court and the Courts of Appeals for the Sixth, Seventh and District of Columbia Circuits, and has endeavored unsuccessfully to obtain voluntary compliance on the part of the employer.[9]

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[9] The above statistical data relates only to those claims with respect to which the veteran has requested representation by the Department of Justice. We do not have available information as to the number of pending cases of this type wherein the veteran is represented by private counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
Attorneys.

MARCH, 1957.

APPENDIX A

Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U.S.C. App. 459 (formerly Section 9 of the Selective Service Act of 1948, 62 Stat. 604, 614) provides in relevant part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * *

(e)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or (c)(1) of this section, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall

not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent any such action.

1. *Opinion of the Court of Appeals.*

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 5436—November Term, 1956

HENRY T. McKINNEY, APPELLANT

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, APPELLEES

Appeal from the United States District Court for the Eastern District of Oklahoma

(December 22, 1956)

Before BRATTON, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

Henry T. McKinney, an honorably discharged veteran, brought this action against the Missouri-Kansas-Texas Railroad Company to enforce alleged employment rights under §9 of the Universal Military Training and Service Act of 1951, 50 U.S.C.A. Appendix § 459. The Union was granted leave to intervene on its own motion. He appeals from the judgment of the Court dismissing his complaint on the grounds that it failed to state a claim upon which relief could be granted.

In his complaint McKinney alleged a collective bargaining agreement dated August 1, 1925, was still in effect, between M-K-T and the Union, of which he was a member; it was claimed that this agreement gave him

rights for advancement upon his return from the service under the interpretation of the Act. The contract provides for three classes of employees, Groups 1, 2 and 3. Each Group has its own seniority schedule. At the time of his induction into the service McKinney was an employee of Group 2. Rule 15 of the contract provides that a worker returning after a leave of absence may return to his former position or exercise seniority rights to any position "bulletined" during his absence. Rule 1 (3)(A) provides that employees in Group 2 are entitled to promotions to Group 1 in preference over non-employees, "based upon fitness and ability." Rule 4 provides that upon such promotion seniority begins at the time the employee's pay starts in the respective class of service when employees are assigned to positions as provided for in Rule 10. It is by Rule 10 procedure that McKinney claims he is being denied his rights under the Act. There it is provided that vacancies will be bulletined in places easily accessible to employees and after applications are received the name of the successful applicant would be posted. Rules 1(3)(C) and 23 provide that within the respective Groups seniority might be exercised by employees whose jobs had been abolished. Grievances regarding rejection of seniority demands in that event were provided for by appeals.

On September 8 and 10, 1952, while McKinney was still in the service two positions in Group 1 were bulletined. The first was the position of bill clerk, given to R. B. Fabian on September 15, 1952, and the other was assistant cashier, given to G. B. McCuan on September 22, 1952. Both of these men were non-employees. Upon his discharge from the military on September 25, 1952, McKinney applied for re-employment and was rehired on October 2, 1952, as assistant cashier in Group 1, and was given G. B. McCuan's job.

It is McKinney's contention that when he returned

he was entitled to exercise his seniority rights and place himself in the position of bill clerk, the position held by Fabian, in accordance with Rule 1(3)(A) of the contract. When he was given G. B. McCuan's position his seniority in Group 1 was dated as of October 7, 1952. He protested claiming that his seniority should be dated either September 8 or 10, 1952, when the vacancies were first bulletined. He continued to serve as assistant cashier, however, under the protested arrangement until the job was abolished on September 4, 1953. Thereupon he reasserted his contention that he deserved higher seniority than R. B. Fabian and sought to "bump" him on that basis, and this was denied by M-K-T on the basis of his earlier assigned seniority date in Group 1. He was reassigned to his position in Group 2 held prior to his induction into the service and has held it since September 5, 1953.

The appellee Union challenges the jurisdiction of the district court on two grounds. It is urged that in any event the National Railroad Adjustment Board was vested with primary exclusive jurisdiction[10] of the controversy between these parties; that appellant McKinney could not bypass the National Railroad Adjustment Board and seek relief in the federal district court. The Railway Labor Act[11] vests in the National Railroad Adjustment Board jurisdiction to interpret agreements and adjudicate issues between railroads and their employees. The National Railroad Adjustment Board is given broad jurisdiction to interpret agreements and adjudicate issues between railroads and their employees with appropriate and comprehensive administrative procedure provided for the dis-

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[10] In Slocum v. Delaware L. & W.R. Co., 339 U.S. 239, * * * in footnote 7 the Court states: "Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.

[11] 48 Stat. 1185, 45 U.S.C.A. §151, et seq.

charge of such functions. But Section 9(d) of the Universal Military Training and Service Act, supra, expressly gives to any qualified and returning serviceman the right to institute a proceeding in the United States Courts to require a former employer to comply with the provisions of the Act regarding preservation of re-employment and seniority rights. The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. The Railway Labor Act is general legislation dealing with labor disputes as such. The Universal Military Training and Service Act is a specific statute for the benefit of all veterans honorably discharged and regards itself with disputes arising from such status upon their return. Being a specific statute for the resolution of specific grievances, it must control.

It is next contended by the Union that the Court lacked jurisdiction because of the absence of an indispensable party, Fabian. It is contended that Fabian's rights are involved in this controversy and that, therefore, he is indispensable to a final adjudication. The 1951 Act, however, specifically provides "That only the employer shall be deemed a necessary party respondent to any such action." Under this clear provision of the statute a controversy of this kind is solely between the returned veteran and the former employer and no one else need be joined as a party litigant.[12] The Union

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[12] United States ex rel Deavers v. Missouri-Kansas-Texas Railroad Co., 171 F.2d 961; Connor v. Pennsylvania Railroad Company, * * * 177 F.2d 854.

places strong reliance on the decision of our Court in *Johnson* v. *Interstate Transit Lines*, 163 F.2d 125. We did hold in that case that the other interested employees were indispensable parties. It is sufficient however to say that case is not controlling or in conflict with what we now hold, because it arises under the Act of 1940 which did not contain the provision of the 1951 Act quoted above or any similar provision.

On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service.[13] This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.

To determine where he would be had he not entered the service and had he remained with the company, we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service.[14] The collective bargaining agreement classifies the employees into three Groups. Under the agreement the rights of the employees predicated upon seniority are expressly confined to members within each Group, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference

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[13] Oakley v. Louisville & N.R. Co., 338 U.S. 278 * * *; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 * * *; Meehan v. National Supply Co., 10 Cir., 160 F.2d 346; Hewitt v. System Federation, 7 Cir., 161 F.2d 545.

[14] Trailmobile Company v. Whirls, 331 U.S. 40 * * *.

to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however upon a determination that the employee seeking such advancement is fitted and qualified for such position. Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service.

Under Rule 4 McKinney's senority rights in Group 1 began when his pay started in that Group. His pay no doubt started on October 2, 1952, when he was rehired. It may be that his seniority in that Group began on that day rather than on October 7 when it was made to begin. It may also be that he was not entitled to "bump" McCuan because it would seem that his seniority was junior to that of McCuan's. But this was not an issue in the case. It is apparent from what has been said that his seniority rights in Group 1 were in any event junior to those of Fabian and he was therefore not entitled to "bump" him when his job in Group 1 was abolished. The conclusion we have reached on the main issue of the case makes unnecessary consideration of the question of laches.

AFFIRMED.

2. *Judgment.*

Twenty-sixth Day, November Term, Saturday, December 22nd, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of
ne record from the United States District Court for
ne Eastern District of Oklahoma and was argued by
ounsel.

On consideration whereof, it is ordered and adjudged
y this court that the judgment of the said district court
n this cause be and the same is hereby affirmed.

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SUPREME COURT, U.S.

No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1957

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The United States District Court for the Eastern District of Oklahoma rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 17–22) is reported at 240 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (R. 22). The petition for a writ of certiorari, filed March 21, 1957, was granted on May 6, 1957. 353 U. S. 948. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted by respondent to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he would have had the opportunity to qualify for the position had he remained in the continuous employment of the respondent.

STATUTE INVOLVED

Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, provides in pertinent part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time

of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or (c) (1) of this section, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,*

That only the employer shall be deemed a necessary party respondent to any such action.

STATEMENT

The petitioner, an honorably discharged veteran, brought this action against his employer, the Missouri-Kansas-Texas Railroad Company, to enforce re-employment rights arising under Section 9 of the Universal Military Training and Service Act of 1951, *supra*, pp. 2–5.[1] The complaint (R. 2–10) was dismissed by the District Court for failure to state a claim for which relief could be granted (R. 15–16). The facts, as set out in the complaint (R. 2–5), the pertinent terms of the collective bargaining agreement (R. 5–9), and the proceedings in the courts below are as follows:

On September 25, 1950, the petitioner was in the employment of the respondent Railroad as a Relief Clerk—Chief Caller (R. 3). This position came within what was termed the Group 2 classification of employees in the collective bargaining agreement between the Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 2). On September 26, 1950, the petitioner left his employment for the purpose of training and service in the armed forces. He remained in military service until honorably separated on September 25, 1952. (R. 3.)

[1] The Department of Justice appears for petitioner pursuant to the provisions of Section 9 (d) of the Universal Military Training and Service Act of 1951, *supra*, *pp.* 4–5. Under the same provision, petitioner was also represented in both courts below by the Department of Justice.

While in the service, the Railroad, pursuant to Rule 10 of the agreement (R. 7), bulletined two position vacancies in the Group 1 classification of employees (R. 3–4). The first of these—that of Bill Clerk—was bulletined on September 8, 1952 and filled on September 15, 1952. The second—that of Assistant Cashier—was bulletined on September 10, 1952 and filled on September 22, 1952. (R. 3.) Both positions were filled by men not then in the employ of the Railroad (R. 3).

Rule 5 of the agreement (see page 4 of Ex. A to the complaint, on file with the Court) provides that employees covered by the rules of the agreement shall be in line for promotion; that promotion, assignments, and changes in force will be based upon seniority, fitness, and ability; and that fitness and ability being sufficient, seniority shall prevail. Rule 10 of the agreement (R. 7) provides that employees desiring bulletined positions shall file application with designated officials and within specified time limits. Rule 1 (3) (A) (R. 6) provides that:

> * * * Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).[2]

[2] Rule of the agreement is as follows: "*Vacancies, New Positions.—Rule 6.*—Seniority rights of employes to vacancies or new positions will be governed by these rules." (See Ex. A to complaint).

Because of his absence in military service, the petitioner was unable to make application for either of the Group 1 positions bulletined on September 8 and 10, 1952 (R. 3). Rule 15 of the agreement (R. 7), however, provides that an employee returning after leave of absence may return to his former position, or upon return or within three days thereafter may exercise seniority rights to any position bulletined during his absence. The petitioner applied for re-employment on October 1, 1952, and was re-employed on October 2, 1952. Displacing the incumbent, he was immediately assigned the position of Assistant Cashier, the Group 1 position bulletined on September 10, 1952. (R. 4.) The petitioner, over his protest, was assigned a Group 1 seniority date of October 7, 1952, instead of September 8 or 10, 1952, the dates the two Group 1 positions were bulletined (R. 4).

The petitioner served as Assistant Cashier until the position was abolished on September 4, 1953 (R. 4). On September 2, 1953, he requested, under Rule 23,[3] that he be permitted to exercise his seniority rights and place himself in the position of Bill Clerk, the Group 1 position bulletined on September 8, 1952. The petitioner's request was rejected solely because the seniority date of October 7 made him a junior employee to the incumbent Bill Clerk whose seniority date was September 15, 1952. The petitioner protested, without avail, the refusal to assign him the Bill Clerk position. (R. 4.) Continuously from Sep-

[3] Rule 23 (R. 7) provides that employees whose positions are abolished may exercise their seniority rights over junior employees.

tember 5, 1953, the petitioner has been employed as a Relief Clerk—Chief Caller, a Group 2 position (R. 4).

Alleging that the October 7, 1952, Group 1 seniority date is incorrect and that his correct seniority date is either September 8 or 10, 1952, the petitioner, by this action commenced June 3, 1955, seeks to have his seniority date corrected, to be placed in the Group 1 Bill Clerk position to which a correct seniority date would entitle him, and compensation for wrongful demotion to a Group 2 position (R. 3–4).

On its own motion (R. 12–14), the Union was permitted to intervene (R. 14). Both the Railroad and the Union moved to dismiss the complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) failure to join an indispensable party, the Bill Clerk; and (3) failure to state a claim upon which relief could be granted (R. 10–11, 14–15). On March 14, 1956, the District Court granted the motions on the third ground alone, expressly rejecting in its order the two other grounds (R. 15–16).

The Court of Appeals affirmed (240 F. 2d 8; R. 17–22). It held, in effect, that it was irrelevant whether, as alleged, the petitioner would have obtained Group 1 seniority as of September 8 or 10, 1952, had his military service not intervened. The court deemed the critical consideration to be, instead, that, had the Group 1 positions become available while the petitioner was in the employ of the Railroad, he would not have had "the absolute right to demand either of these positions over the non-employee applicants [but] * * * could have demanded them only after a determi-

nation of fitness and qualification" (R. 21). In the court's view, because of this factor alone, the governing statute afforded the petitioner no protection whatsoever with respect to seniority in Group 1; the consequence was that, when upon his return from service he immediately qualified for and was promoted to the higher classification, he was not entitled as a matter of statutory right to have his seniority in that classification computed from the date he allegedly would have qualified—and been promoted—had he remained in respondent's continuous employ (R. 20–21). In this connection the court expressed its belief that Section 9 of the Act encompasses "only such established seniority rights as [petitioner] had when he entered the service" (R. 21).

SUMMARY OF ARGUMENT

A. (1). Section 9 (c) (1) of the Universal Military Training and Service Act of 1951, *supra*, p. 3, requires that a veteran returning from military service be restored to his employment "without loss of seniority." Section 9 (c) (2), *supra*, pp. 3–4, contains the Congressional declaration that upon restoration the veteran is to be given "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." This declaration in Section 9 (c) (2) is a codification of the "escalator principle" laid down by this Court in construing the Selective Service and Training Act of 1940 which contains a re-employment provision identical to Section 9

(c) (1) of the 1951 Act. As applied by this Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3), it is now clear that under Section 9 of the Act a veteran, who upon re-employment qualifies for and is given an advanced position in his employment, is entitled to a seniority status in that position based upon the date the veteran would have been entitled to qualify for the position had he been continuously employed.

(2). The petitioner, at the time of his induction into the armed forces was, by the terms of the collective bargaining agreement, a Group 2 employee with the respondent Railroad. Upon his return from military service, he was re-employed and, displacing an employee hired in his absence, was immediately promoted to a Group 1 position. He was, however, given a seniority date in the Group 1 position which was later than he would have been entitled to but for his military service. He has, therefore, been denied the seniority benefits guaranteed to him by the statute.

B. (1). In the petitioner's absence, two Group 1 positions became vacant and were bulletined by his employer. By the terms of the collective bargaining agreement the petitioner, had he been present, would have been entitled to bid on either or both positions and, in filling the vacancies, the petitioner would have been entitled to preference, subject to establishing his fitness and ability, over non-employees. Non-employees were employed to fill both vacancies. The petitioner's complaint alleges, in effect, that but for his absence in military service he would have obtained

Group 1 status and seniority on the dates the Group 1 positions were bulletined. Measured by the decisions of this Court and the declaration in Section 9 (c) (2) of the Act, the complaint in this case clearly stated a claim which, upon proof of the facts alleged, would entitle the petitioner to relief. It was, therefore, improperly dismissed.

(2). The fact that the promotion the petitioner would allegedly have received, had he been continuously employed, would have been based upon "fitness and ability" affords no basis for denying the petitioner the seniority benefits of the Act. If petitioner's lack of fitness or ability would have foreclosed promotion, that is a matter for proof not to be assumed on a motion to dismiss the complaint. Moreover, the "absolute right" to promotion test adopted by the Court of Appeals is, as a criterion for the seniority benefits of the Act, unrealistic. Promotion in most industry is implicitly, if not expressly, conditioned upon the employee's fitness, ability or skill. To deny absolutely the seniority benefits solely because the right to promotion is conditioned on ability is, in effect, to sap the continuous employment test of much of its vitality. As a bar to the seniority benefits of the Act, the "absolute right" test should be rejected here—as we believe it has been rejected by the Court in the past.

(3). The petitioner's right to be promoted to the Group 1 position, as well as his "fitness and ability" to fulfill the responsibilities of the position, are, if presently in issue, convincingly evidenced by the fact that, upon his return from military service, he was

immediately promoted to the advanced Group 1 position, displacing the Group 1 appointee hired in his absence. He discharged satisfactorily his duties in the Group 1 position for the better part of a year and was demoted to Group 2 status solely because of seniority.

Dismissal of the complaint, moreover, denies the petitioner the opportunity to present evidence that, as a reasonable probability, he would have obtained Group 1 status when, in his absence, Group 1 vacancies occurred and were filled by outsiders. At the very least, compliance with the mandate of Congress requires that the petitioner be given the opportunity to prove that had he been continuously employed he would have been able to qualify for the Group 1 status on either of the dates the positions in that group became available.

ARGUMENT

Petitioner is entitled to Group 1 seniority as of the date he would have been entitled to qualify for a Group 1 position had his employment with the Railroad not been interrupted by military service

Upon his return from military service, the petitioner was restored to his former employment. He immediately qualified for and obtained the Group 1 position of Assistant Cashier, a position bulletined in his absence and filled by an outsider. By the present action, the petitioner seeks to require his employer to give to him the seniority date in the Group 1 position which he would have had but for the inter-

vention of military service.[4] His right to a Group 1 seniority date which is not set back to a later time by reason of his absence in military service rests upon Sections 9 (c) (1) and 9 (c) (2) of the Universal Military Training and Service Act of 1951 (*supra*, pp. 3–4). By Section 9 (c) (1), Congress has directed that personnel returning from military service be restored to their civilian employment "without loss of seniority." Section 9 (c) (2) provides that one "who is restored to a position * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Section 9 (c) (1) of the 1951 Act is a re-enactment of Section 9 (c) (1) of the Selective Service Act of 1948[5] which, in turn, was a reenactment of Section 8 (c) of the Selective Service and Training Act of 1940.[6] The interpretative rulings of this Court with

[4] With a correct Group 1 seniority date of September 8 or 10, 1952, there can be no dispute that under Rule 23 of the agreement (R. 7) petitioner is entitled to displace the Bill Clerk whose seniority dates from September 15, 1952. Similarly, a correction of his Group 1 seniority date would entitle him to compensation for loss of wages suffered by reason of his wrongful relegation to the Group 2 position. 50 U. S. C. App. 459 (d), *supra*, p. 4.

[5] 62 Stat. 604, 614, as amended, 50 U. S. C. App. 459.

[6] 54 Stat. 885, 890, as amended, 50 U. S. C. App. (1946 ed.) 308.

respect to Section 8 (c) of the 1940 Act and the decision of this Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, demonstrate that petitioner's complaint states a cause of action and was, therefore, improperly dismissed.

A. A veteran qualifying for and obtaining an advanced position upon his return from military service must be given the seniority date in that position to which he would have been entitled had he been continuously employed

1. Section 8 (c) of the 1940 Act was first before this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. There, with respect to the "without loss of seniority" requirement, the Court said (328 U. S. at 288): "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence." Similarly, in this same opinion, it was said (328 U. S. at 284): "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." And, the veteran's seniority rights were summarized as follows (328 U. S. at 284–285):

> Thus [the veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

From the *Fishgold* case thus emerged the escalator principle—a principle reaffirmed by the Court in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 58,[7] and ap-

[7] In the *Trailmobile* case, it was stated that the "restored veteran * * * could not be disadvantaged by his service to the

proved and restated in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278 at 283, as follows:

> * * * [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.[8]

In Section 9 (c) (2) of the Selective Service Act of 1948 (62 Stat. 614) and Section 9 (c) (2) of the Universal Military Training and Service Act of 1951 (65 Stat. 75), 50 U. S. C. App. 459 (c) (2), *supra*, pp. 3–4, Congress ratified the continuous employment test in the following terms:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his en-

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nation" and was not to be penalized upon his return because of his absence from his civilian job (331 U. S. at 58). The standing of the restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U. S. at 56).

[8] See, also, *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521.

tering the armed forces until the time of his restoration to such employment."

The escalator principle or continuous employment test, as formulated in the *Fishgold, Trailmobile,* and *Oakley* cases and as ratified by Congress in Section 9 (c) (2), received its most recent practical application by this Court in *Diehl* v. *Lehigh Valley R. Co.*; 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3). In *Diehl* the veteran, Diehl, was employed by the Railroad in 1942 as a carman helper. In February 1943, he was given the position of a temporary carman mechanic. Two months later he was inducted into the armed forces. In 1945, upon being honorably discharged from the military service, the veteran resumed his employment with the Railroad as a temporary carman. On January 10, 1949, he completed 1,160 days of actual work in that capacity. Had he remained in the continuous employ of the Railroad, however, he would have completed the 1,160 days on June 1, 1946.

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[9] No important substantive changes with respect to re-employment were made in the 1948 Act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2d Sess., p. 15. This same report refers (p. 16) to Section 9 (c) (2) in terms of a "statement of policy regarding application of the 'escalator principle'", an obvious reference to the "escalator principle" of the 1940 Act announced in *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* And the Section, of course, differs in no material respect from the statement of that principle in *Oakley* v. *Louisville & N. R. Co., supra.*

On March 1, 1949, the Railroad and the Union entered into an agreement providing that (211 F. 2d at 97):

> A car man helper, who has qualified as a car man mechanic * * * and is presently working on position of a temporary car man mechanic on the effective date of this agreement [March 1, 1949], shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1160 days as a temporary car man mechanic to be placed on the permanent car man mechanics' roster with seniority date as of the effective date of this agreement *in the order with other men in which he completed 1160 days' experience* * * * and if so electing shall forfeit his seniority as a car man helper. [Emphasis added.]

Purportedly acting under this agreement, the Railroad placed the veteran, who elected to take seniority as a permanent carman, on the applicable seniority roster in a position junior to certain nonveteran employees. These nonveterans had started working as temporary carmen after the veteran but, because of their continuous employment, had completed the 1,160 days' experience between June 1, 1946 and January 10, 1949 (i. e., before Diehl did so).

Diehl then brought suit under Section 8 (c) of the Selective Training and Service Act of 1940 to compel the employer to place him above the nonveterans on the seniority list. His argument was that, once he had met the qualifying requirements for status as a carman, he was entitled to a seniority date in that status computed on the basis of the date (June 1, 1946) that he would have qualified had he not been inducted into

the military service. In support of this construction of the statute, he pointed to the *Oakley* case, as well as to the later codification of the "escalator principle" in the Selective Service Act of 1948 (50 U. S. C. App. 459 (c) (2)).

The District Court rejected Diehl's argument and dismissed the action. Its reasoning was that the Act required no more than the restoration of the veteran with the seniority to which he was entitled when he entered the military service—i. e., seniority as a helper only; that his temporary assignment to carmen's work had not entitled him, when he left for military service, to seniority as a carman; that his "expectation" to be promoted to a carman on a permanent basis was not protected by the Act; and that the Act did not require military service to be taken as the equivalent of the 1,160 days' experience required by the collective bargaining agreement.

The Court of Appeals affirmed. 211 F. 2d 95. Recognizing that the "continuous employment" test laid down in *Oakley* and codified in Section 9 (c) (2) of the 1948 and 1951 Acts would require giving Diehl status as a carman from the date upon which he would have completed the 1,160 days' experience had he been in the continuous employ of the Railroad, the court expressed the belief (211 F. 2d at 99) that the test conflicted with that provision in Section 8 (c) that the returning veteran "shall be considered as having been on furlough or leave of absence." Finding this purported conflict to be irreconcilable, the court ruled that the "furlough or leave" clause must govern (211 F. 2d at 99). Since Diehl had been ac-

corded the same seniority on the carman's roster as he would have been given under the collective bargaining agreement had he been on an ordinary leave of absence instead of in military service, the court concluded that the requirements of the statute had been fulfilled (211 F. 2d at 99–100).

This Court, citing *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, reversed, *per curiam*, necessarily holding that Diehl, upon his return from military service and upon qualifying for the advanced position, was entitled to a position on the carman's seniority roster based upon the date he would probably have qualified as a carman but for his military service. *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960.[10]

Thus, it is established beyond question that a veteran who under the terms and conditions of his employment would probably have obtained a higher position in his employment, but for the intervention of military service, must, upon return and upon being promoted to the higher position, be given a seniority date in that position that he would have had had he been continuously employed. See also *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6); *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957; *Morris* v. *Chesapeake & Ohio*

[10] Though petitioner's appeal to the court below was specifically based on the holding in *Diehl*, the case is not given even passing mention in the opinion of the Court of Appeals. Compare, *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6) and *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957, where, on parallel facts, *Diehl* was deemed dispositive. See also, *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.).

Ry. Co., 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.); *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.).[11]

2. In partial recognition of petitioner's rights under the collective bargaining agreement and Section 9 of the Act, upon the petitioner's application for reemployment on October 1, 1952, he was, on October 2, placed in the Group 1 position of Assistant Cashier, displacing one McCuan who, as an outsider, was hired to fill the vacancy on September 22, 1952.[12] Petitioner thus resumed his employment in a position he would have been eligible to apply for had he remained in the

[11] Compare, *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867 (C. A. 4); *Adkison* v. *Tennessee Coal, Iron & R. Co.*, 204 F. 2d 340 (C. A. 5); *Lipscomb* v. *Tennessee Coal, Iron & R. Co.*, 189 F. 2d 708 (C. A. 5); *Special Service Co.* v. *Delaney*, 172 F. 2d 16 (C. A. 5); *Altgens* v. *The Associated Press*, 188 F. 2d 727 (C. A. 5); *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466 (C. A. 6); *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C. A. 9). These decisions, all prior to and irreconcilable with the *Diehl* case, are of doubtful present value.

[12] Rule 15, R. 7, provides that "An employee returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner."

Under Section 9 (c) (1) of the Act (*supra*, p. 3), a person restored to employment pursuant to Section 9 (b) "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, * * *."

Railroad's continuous employ; but his advancement to the Group 1 position was only a partial recognition of his rights since, in advancing him to the Group 1 position of Assistant Cashier, the Railroad fixed his seniority date in Group 1 as October 7, 1952. This seniority date plainly reflected a loss of advantage arising from his absence on military service. His subsequent demotion to Group 2 solely because of lack of seniority demonstrates that the disadvantage arising from the petitioner's military service was real. This disadvantage partakes of a penalty, contrary to the plain dictates of Section 9 of the Act and the teachings of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40; *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278; and *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3). In light of the terms and conditions of his civilian employment, it is clear, we submit, that the October 7, 1952, seniority date denied the petitioner his statutory right to be restored to his employment "without loss of seniority." His complaint which seeks redress for this wrong states a cause of action and was improperly dismissed.

B. Under the terms and conditions of petitioner's employment, had he been continuously employed he would have been entitled to qualify for Group 1 status on September 8 or 10, 1952

1. The petitioner's complaint alleges, in effect, that if he "had continued in [his] employment continuously from the time of his entering the armed forces until the time of his restoration" (Section 9 (c) (2)), he would have obtained Group 1 status on September

8 or 10, 1952. The claim is, of course, based upon events which transpired during his absence from the Railroad's employment and the assertion that he would have been promoted to the Group 1 position is grounded upon the terms and conditions set out in the collective bargaining agreement.[13]

By the terms of the collective bargaining agreement between the respondents, employees covered by the rules of the agreement are "in line for promotion" (see Exhibit A to the complaint, rule 5, p. 4); and employees are entitled to bid for new positions or vacancies (Rule 10. R. 7). With respect to promotions to Group 1 positions, Group 2 employees are

[13] Were the petitioner's *seniority date* a matter to be determined solely by the collective bargaining agreement, the petitioner would have small room for quarrel with the date assigned him. The agreement provides that "[n]o seniority is established in any group unless service in that group is actually performed after being regularly assigned to a position in that group, * * *" (see Exhibit A to complaint, on file with the Court, Rule 19, p. 8). And Rule 4 provides that "[s]enority begins at the time the employe's pay starts in the respective branch or class of service * * *." It was, presumably, pursuant to these Rules that petitioner was assigned a Group 1 seniority date of October 7, 1952, even though his re-employment in Group 1 commenced October 2, 1952 (R. 4). Whether the October 7 date was correct or not under Rules 4 and 19, these rules must give way to the "without loss of seniority" requirement of Section 9 (c) (1) of the Act. It has, of course, long been settled that neither the "practice of employers [nor] agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285; *Moe* v. *Eastern Air Lines*, No. 16409 (C. A. 5), decided June 18, 1957; *Spearmon* v. *Thompson*, 167 F. 2d 626, 630 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson*, 335 U. S. 886; see, also, *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549, 553 (dissenting opinion) (C. A. 3).

given preference over non-employees, based on fitness and ability (Rule 1 (3) (A), R. 6).

Had the petitioner been continuously employed, he would have been "in line for promotion;" he could, and no doubt would, have bid on either or both the Group 1 promotional positions bulletined on September 8 and 10, 1952; and, as a Group 2 employee, he would have been entitled to preference, based on fitness and ability, over the outsiders who were employed to fill the vacancies. Though there undoubtedly is an element of uncertainty in any determination of the status a veteran would have achieved in his employment had he been continuously employed,[14] the circumstances of this case provide no reasonable basis to doubt that the petitioner, had he been continuously employed, would, as his complaint alleges, have achieved Group 1 status on either September 8 or 10, 1952.

Thus, the complaint and the relief which the petitioner seeks fall within the principle of the *Diehl* case, *supra,* where the veteran's seniority position on the carmen's seniority roster was held to be determined by the date he would probably have qualified as a carman had he been continuously employed. The petitioner's claim is similarly indistinguishable from the claim in *Mann* v. *Crowell-Collier Publishing Co.,* 239 F. 2d 699 (C. A. 6), where, upon qualifying as a journeyman photoengraver, the veteran's

[14] Vacations, illness, change of circumstances, possible layoffs, all are factors which contribute to the uncertainty which inheres in any determination of the status in private employment a veteran would have achieved had he been continuously employed.

seniority date in that capacity was held retroactive to the date he would probably have gained that status but for military service. Neither is this case distinguishable from *Morris* v. *Chesapeake & Ohio Ry Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967 and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), where seniority in advanced positions was back-dated to the point where advancement would probably have occurred had the veterans been continuously employed. See also, *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.). Plainly, when measured by these decisions, the petitioner's complaint states facts which if proved, would entitle him to relief.

2. In holding that the complaint failed to state a claim upon which relief could be granted, the Court of Appeals based its decision on Rule 1 (3) (A) of the agreement (R. 6) which conditions a Group 2 employee's preference for promotion over nonemployees on "fitness and ability." Since petitioner, because of this qualification, would not have had an "absolute right" to either Group 1 position had he not been in the service, he was not, the court held, entitled to the seniority benefits of the Act. 240 F. 2d 8; R. 20–21.

To deny the seniority benefits of Section 9 because the promotion he allegedly would have obtained would have been based on "fitness and ability" is, in effect, to sap the continuous employment test, the statutory measure of veterans' seniority rights, of much of its vitality. Promotion or advancement is rarely inde-

pendent of fitness, ability, or some form of relative skill.[15] Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining* (1941), pp. 33–46; Torff, *Collective Bargaining* (1953), pp. 102–111. If not expressed in the collective bargaining agreement itself, fitness, ability and skill are implicit qualifications upon promotional rights which are generally acknowledged by both unions and management. Harbison, *op. cit.*, p. 33. Ability, as a criterion for promotion, is, in short, a part of the common law of industry. Cf., Twentieth Century Fund, *How Collective Bargaining Works* (1945), p. 461. Indeed, Congress has so recognized since an employer's obligation even to re-employ a veteran is conditioned on the veteran being "qualified to perform the duties" the position requires. Section 9 (b) (B) (i), 50 U. S. C. App. 459 (b) (B) (i).

In the *Diehl* case, *supra;* the veteran's right to a carman's status was, if not expressly so, implicitly conditional upon his demonstrating his fitness and ability as a carman helper and a satisfactory completion of a fixed number of days actual work in that capacity. And in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6), the collective bargaining

[15] "Of an examination of 400 union agreements made between 1935 and 1939, * * * [n]o stipulations for promotion were made in 238 of the 400 agreements. Straight seniority, unaffected by other considerations, governed promotions in 30. Seniority with ability being deemed 'sufficient' (typical of railway promotions) was laid down in 64. Forty-two agreements provided that, when ability was equal, seniority should govern. Only one agreement specified unqualified ability as sole determinant for promotion." Williamson and Harris, *Trends in Collective Bargaining* (1945), p. 100, n. 21.

agreement expressly conditioned eligibility for promotion to journeyman upon the satisfactory completion of an apprenticeship and the passing of qualifying examinations. Although this factor is not mentioned in the opinion in that case, it was clearly raised by the pleadings. Though the promotion there involved was far short of an "absolute right," the Sixth Circuit, following the *Diehl* case, correctly held that, upon return from service and upon qualifying as a journeyman, the veteran's seniority in that capacity was retroactive to the date he would probably have qualified as a journeyman but for his absence in military service.[16]

In *Morris* v. *Chesapeake & Ohio R. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, promotion to train dispatcher was conditioned upon a telegrapher's passing a qualifying examination. Though promotion hardly could be said to be a matter of "absolute right," upon his qualifying and being promoted to train dispatcher upon his return from service, the Seventh Circuit sustained the veteran's claim to seniority from the date upon which the telegrapher, junior to the veteran, had, in the veteran's absence, been promoted to train dispatcher.

In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), freight employees were, by agreement, to be given "consideration" in filling vacancies in the passenger service (177 F. 2d at 855). The established practice was to transfer "qualified" (177 F. 2d at 857) trainmen to passenger service upon

[16] Compare *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903.

application. Though there clearly was not an "absolute right" to promotion, the court held that, upon return from service and upon being promoted, the veterans were entitled to a seniority date based upon the date they would probably have been promoted had they been continuously employed.[17]

These cases are in full accord with the rulings in the *Fishgold, Trailmobile, Oakley* and *Diehl* cases, *supra,* and correctly apply the "continuous employment" test now appearing in Section 9 (c) (2) of the Act. They constitute the present consistent interpretation[18] of the Congressional command that a veteran be restored to private employment "without loss of seniority"—a command which has its roots in Congressional recognition of the importance of seniority as an attribute of employment in unionized industry,[19] particularly the railroad industry where "the principle of seniority has been developed most completely and is most widely applied." Twentieth Century Fund, *op. cit.*, p. 351.

The importance of seniority is aptly illustrated by this case where, solely because of seniority, petitioner

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[17] The opinion of the Court of Appeals for the Second Circuit in *Borges et al.* v. *Art Steel Co.*, No. 401, Oct. Term, 1956, decided July 8, 1957, would limit the application of Section 9 (c) of the Act to exclude pay increases or promotions awarded on the basis of "skill or merit." That case, however, dealt with the right to promotion as such and is not contrary to the position we urge here since we are not concerned in this case with the right to promotion to Group 1, for which fitness and ability were concededly prerequisites, but with the date of seniority to be assigned to a promotion which has already been granted.

[18] Compare the decisions *contra* cited, *supra*, p. 20, n. 11, all of which antedate and are irreconcilable with the *Diehl* case.

[19] *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526.

has been demoted to a Group 2 status. The seniority disadvantage under which he was placed was attributable only to the fact of his absence in military service. Unless corrected, it is a disadvantage which he will, of course, carry throughout the course of his employment with the Railroad. Just as the matter of less than 30 days seniority has, in this case, spelled the difference between the better-paying Group 1 status and that of Group 2, the same difference may some day spell the difference between employment and unemployment, retirement or nonretirement, promotion or nonpromotion. And to refuse him the seniority date he would have had but for military service, in addition, may well affect his rights of transfer, his choice of shifts and vacation periods, to mention but a few of the incidents of employment commonly affected by the principle of seniority.[20]

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[20] To determine a veteran's seniority date in an advanced position as of the time he would have been entitled to qualify for that position, but for military service, can pose no serious administrative problem for either unions or management. Indeed, the escalator principle, as enunciated by this Court and as applied in *Diehl*, is expressly embodied in the collective bargaining agreements of a number of major railroads including the New York Central, the New Haven, the Boston & Maine, the Santa Fe and the Missouri Pacific. For example, the New York Central system provides in its bargaining provision covering apprenticeship ("Memorandum of Understanding Relative to Rules of the Shop Crafts Hereinafter Listed," between New York Central and other roads, and System Federation 103 representing crafts here involved) that:

"An apprentice who, subsequent to May 1, 1940, entered the armed forces of the United States; whose reemployment rights are protected by the Service Extension Act of 1941; who returns to the railroad company's service within the specified period of forty (40) days; and who thereafter resumes and

3. Even if Rule 1 (3) (A) of the agreement, because of the "fitness and ability" qualification, does not confer an absolute right upon petitioner to seniority in Group 1 as of the date he would have been eligible to bid for promotion, neither is the Rule an absolute bar to proof that he would have been promoted at an earlier date, as it was treated by the court below. Convincing evidence of the fact that the petitioner would have been promoted to Group 1 on September 8 or 10 had he been continuously employed lies in the fact that he was promoted to Group 1 immediately

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completes his apprenticeship shall, upon completion of apprenticeship, be given the same seniority date as mechanic that he would have obtained if there had been no such interruption in apprenticeship.

"*Example.*—Apprentice A began apprenticeship December 1, 1939; was inducted into the U. S. Army December 1, 1941; resumes apprenticeship December 1, 1943; completes apprenticeship December 1, 1945; will be given dating as mechanic December 1, 1942.

"*Exception.*—On the Michigan Central no apprentice will be given hereunder a ranking as mechanic ahead of any apprentice who completed his apprenticeship before March 15, 1942, and therefore did not receive the benefit of the one year prior dating provision.

"Accepted for System Federation No. 103:

"(S) JOHN RIEBER,
Secretary.

"Accepted for Management:

"(S) L. W. HORNING,
Manager, Personnel.

"JANUARY 27, 1943."

Such agreements are on file as a matter of public record with the National Mediation Board pursuant to Section 5, third (e) of the Railway Labor Act, 48 Stat. 1195, as amended, 45 U. S. C. 155. Agreements of similar import are to be found in the oil industry, the automobile industry, and the steel industry.

upon his return from military service. And the fact that he was promoted, and did displace the outsider hired but ten days earlier, indicates that the Railroad itself recognized his right to the Group 1 position.

In any event, since there was nothing before the trial court to establish a lack of ability or fitness on the earlier dates, that was not a fact to be assumed on a motion to dismiss, but was manifestly a matter of proof to be developed at a trial. In this respect, it is significant that while arguing that the petitioner did not have an "absolute right" to a Group 1 position, neither respondent, by answer or otherwise, has ever suggested that the petitioner's "fitness and ability" were not fully adequate for promotion to Group 1. And if the petitioner's "fitness and ability" is open to question, again we think that strong evidence of his fitness and ability lies in the fact that upon his return from military service, within a month after the Group 1 positions were first bulletined, the petitioner was immediately permitted to displace the junior of the two outsiders employed to fill the bulletined positions. From October 2, 1952 to September 4, 1953, he discharged the responsibilities of the Group 1 position with apparent satisfaction and was relegated to Group 2 status solely because of his seniority. These circumstances have, of course, been given no consideration by the courts below although their probative value, in resolving an inquiry as to where petitioner would have been in his private employment but for his military service, would seem to be beyond contradiction.

Moreover, by judging the merits of the petitioner's claim solely on the basis of the language of Rule 1

(3) (A) of the agreement, the Court of Appeals resolved the petitioner's right to promotion without benefit of evidence of the interpretation given Rule 1 (3) (A) by the Railroad and the Union. Similarly, by disposing of the case on the complaint alone, petitioner is denied an opportunity to prove that the preference guaranteed Group 2 employees over non-employees in the agreement is by the custom and practice of railroads tantamount to a right of sufficient certainty to sustain a determination that petitioner would have probably obained Group 1 status on September 8 or 10 had he remained continuously in the Railroad's employ. Though interpretation and practice by the parties to the agreement are frequently the most reliable basis for determining rights claimed to have evolved from the agreement, these factors have received no consideration by the courts below.[21]

Therefore, even if the case be treated as one in which the issue is whether the petitioner was entitled to promotion to Group 1, rather than what is the appropriate seniority date in Group 1 for a returned veteran who has been found fit and able and has in fact been promoted, a minimum compliance with Section 9 (c) (2) would require that the petitioner be given the opportunity to prove as a reasonable probability that had he been continuously employed he

[21] In contrast to the summary procedure followed in this case, the *Mann*, *Morris* and *Conner* cases, *supra*, were before the courts of appeals after the development of a full record in the district courts. Significantly, in those cases, the employee's right to promotion was predicated largely upon the employer's promotional practice as demonstrated at trial.

would have been promoted to Group 1 at the earlier date. Dismissal deprived the petitioner of that right.

The respondent union's contention (Brief in Opposition, page 5) that jurisdiction over the parties and the subject matter of this suit is vested exclusively in the National Railroad Adjustment Board by the Railway Labor Act (48 Stat. 1185, 45 U. S. C. 151, *et seq.*) is without merit. Section 9 (d) of the Universal Military Training and Service Act of 1951, *supra*, p. 4, in common with predecessor acts, specifically provides for the enforcement of reemployment rights by conferring jurisdiction upon the district courts "[i]n case any private employer" fails to comply with the reemployment provisions of the Act. Congress treated veterans' reemployment rights as a particular type of dispute and provided a particular remedy. The court below noted (240 F. 2d at 10–11; R. 20):

> The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary.

See also, *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957. It should also be noted that the jurisdictional infirmity here asserted would likewise have been present in many of the decisions of this Court and the courts of appeals cited

and discussed above. These decisions implicitly contradict respondent's contention and are indicative of its lack of substance.[22]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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SAMUEL D. SLADE,
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Attorneys.

AUGUST 1957.

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[22] Similarly unsubstantial is the Union's contention, made in the court below, that the complaint is defective because it assertedly fails to join an indispensable party. Again, the statute is dispositive. Section 9 (d), (*supra*, pp. 4–5) expressly provides that "only the employer shall be deemed a necessary party respondent to any such action."

The defense of laches suggested by the Union (Br. in Op., p. 7) was raised for the first time in the Court of Appeals. While it is open to question whether the Union has any standing to assert this defense (cf., *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275), laches, in any event, is a factual defense inappropriate for consideration on a motion to dismiss.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM TO SUPPLEMENT (AFTER ARGUMENT) TO BRIEF FOR THE RAILROAD RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM TO SUPPLEMENT (AFTER ARGUMENT) TO BRIEF FOR THE RAILROAD RESPONDENT

At the oral argument of this case on January 27, 1958, respondent Missouri-Kansas-Texas Railroad Company requested and was given permission by the Court to file a supplement to its main brief. Respondent's supplement was filed with the Court on February 5, 1958. Petitioner respectfully submits the following memorandum in reply to respondent's supplemental brief and to respondent's letter of February 10, 1958, addressed to the Clerk of this Court, with respect to Rule 5 of the collective bargaining agreement between Missouri-Kansas-Texas Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

I

In this suit, petitioner seeks a Group I seniority date consistent with the statutory requirement that he be restored to his private employment "without loss of seniority." Universal Military Training and Service Act of 1951, § 9 (c) (1), 65 Stat. 75, 50 U. S. C. App. 459 (c) (1). Since petitioner's asserted right in this case is squarely based upon Section 9 (c) (1) of the Act, the Court is not confronted with the problem of whether Section 9 (c) (2), which represents a Congressional statement of the import of Section 9 (c) (1), is independently judicially enforceable under Section 9 (d). Section 9 (d) expressly confers jurisdiction on District Courts to enforce compliance with Section 9 (c) (1), the provision on which petitioner bases his claim. There can, therefore, be no serious question as to the jurisdiction of the District Court under the Universal Military Training and Service Act of 1951 in this case.[1] Consistent prior practice shows that the District Courts have jurisdiction; there have been a large number of "seniority" cases in this Court and the lower federal courts over the past decade. And because Congress has expressly conferred jurisdiction upon the District Courts to en-

[1] The purpose of the 1956 amendment to Section 9 (d) of the Act (70 Stat. 509), to which respondent refers (Supp. Br. pp. 17–18), was to assure that the re-employment and leave-of-absence rights conferred on reservists by Section 9 (g) of the Act are enforceable in the federal courts. See S. Rept. 2087, 84th Cong. 2d Sess. p. 3; H. Rept. 2401, 84th Cong., 2d Sess. p. 1. Cf. *Christner* v. *Poudre Ass'n*, 134 F. Supp. 115, affirmed, 235 F. 2d 946 (C. A. 10).

force the personal benefits accorded veterans by that Act, the earlier Railway Labor Act (44 Stat. 577; as amended, 45 U. S. C. 151, *et seq.*) should not be construed to deprive the veteran of this judicial remedy. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

As to respondent's argument that petitioner's remedy falls within the exclusive jurisdiction of the National Railway Adjustment Board, established by the Railway Labor Act, the jurisdiction of the Board is confined to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U. S. C. 153 First (i)). The statutory jurisdiction of the Board does not extend to an adjustment of veterans' rights under the Universal Military Training and Service Act of 1951. For the enforcement of these rights, Congress has specifically conferred jurisdiction upon the District Courts. Moreover, the National Railroad Adjustment Board, in the past, has consistently refused to pass upon a claim presented by an individual when the individual is not represented by his collective bargaining agent. See, *Administrative Procedure in Government Agencies, Monographs*, S. Doc. No. 10, 77th Cong. 2d Sess., Part 4, pages 3–4, 7[2]; Lecht, *Experience under Railway*

[2] "Individual employees ordinarily first present their claims to their foremen or other immediate superiors. If the claims are granted, the case ends; if they are denied, the employee submits his case to his local union. If the local union rejects it, the case ends; [footnote omitted] otherwise, the representative of the local union takes up the question with the local superintendent of the carrier." *Administrative Procedure in Government Agencies, Ibid.* p. 3–4.

"* * * In some four hundred cases since the establishment of

Labor Legislation (1955), p. 169; see also *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205–206; *Slocum* v. *Delaware, L. R. Co.*, 339 U. S. 239 at 245–254 (dissenting opinion); Cf. *Elgin J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 732–736.[3]

In considering whether petitioner should be required to take his claim before the Board, or whether the claim should be referred to the Board,[4] this Court may take note that petitioner's bargaining agent, the Brotherhood of Railway and Steamship Clerks,

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the Board individuals have sought to assert claims before the Board. With the exception of a few isolated cases of Division IV involving claims of individuals where there was no organization of the particular craft or class on the property, no case asserted by an individual has ever been decided on the merits by the Board. [Footnote omitted.] The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." *Administrative Procedure in Government Agencies*, *Ibid.* p. 7.

[3] "Recently, Mr. H. E. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, opposed the naming of his labor organization as a respondent in a claim by an individual before the NRAB, saying: 'I believe the rule has been clearly established by earlier decisions that in the submission of a claim by an individual, a railway labor organization may not be designated as a party respondent in dispute with the individual.'" [Footnote] "Letter dated November 23, 1955, addressed to Mr. John M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board." Labor Law Journal, January, 1957, Vol. 8, No. 1, p. 11.

[4] "* * * Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity." *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 at 205, 206.

Freight Handlers, Express and Station Employees, in both briefs and oral argument in this Court, has openly sided with the employer in opposition to the merits of petitioner's claim against the Railroad.[5] Thus, the possibility of the petitioner's obtaining union representation before the Board would seem to be remote at best, and, in view of the apparent practice of the Board in such circumstances, the fact well may be that the administrative machinery of the bipartite Board, chosen and compensated by groups of carriers and national unions (45 U. S. C. 153 First (a), (g)), would not, as a practical matter, be available to petitioner at all. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

II

By letter of February 10, 1958, the respondent Railroad advised the Clerk of this Court that Rule 5 of the collective bargaining agreement between the Missouri-Kansas-Texas Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was not to be found in the original transcript on file with the Court. A complete copy of the collective bargaining agreement between respondents was attached to, and

[5] The concurrence of views presented by the employer and the Brotherhood in this case is by no means unique in the history of litigation arising out of the re-employment provisions of the various selective service acts since 1940. See, *e. g.*, respondents' briefs in *Diehl* v. *Lehigh Valley R. Co.*, No. 246, Oct. T., 1954, and *Oakley* v. *Louisville & N. R. Co.*, Nos. 28 and 29, Oct. T., 1949.

marked Exhibit "A", and made a part of petitioner's complaint filed in the District Court (R. 2), and was included in the record on file in the Court of Appeals. Only excerpts from this agreement (R. 5–9), not including Rule 5, were printed as part of the printed record in this Court, as well as in the Court of Appeals.

Rule 5 of the agreement provides as follows:

> APPLICATION—RULE 5.—Employees covered by these rules shall be in line for promotion. Promotions, assignments, and changes in force will be based upon seniority, fitness, and ability; fitness and ability being sufficient, seniority shall prevail. The appointing officer shall be the judge of fitness and ability, subject to appeal as provided in Rule 31.[1]

Counsel for petitioner referred to this rule at the oral argument of the case only by way of response to respondents' statements that the preference over non-employees, based on fitness and ability, accorded Group 2 employees by Rule 1 (3) (A) of the agreement, left to the Railroad complete discretion in filling Group 1 vacancies. Reference was made to Rule

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[1] As the Court was advised at the oral argument, Rule 5 is not reproduced in the printed record in this Court. As stated above, however, the complete collective bargaining agreement between respondents was attached to and is a part of the complaint filed in the District Court and a part of the record on file in the Court of Appeals. The complete agreement was not certified by the Court of Appeals as part of the record transmitted to this Court. The agreement is, in any event, on file as a matter of public record with the National Mediation Board, pursuant to the Railway Labor Act (45 U. S. C. 155, Third (e)).

5, not because it is immediately involved in this litigation, but merely to suggest that, if respondents' statements with respect to the preference accorded by Rule 1 (3) (A) were true, then a like statement could be made with respect to Rule 5, which concerns "promotions, assignments, and changes in force," and states that they, too, are based upon "fitness and ability."

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956

No. ~~849~~ 93

HENRY T. McKINNEY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY and the BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondents.

BRIEF

In Opposition to Writ of Certiorari of Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 849.

HENRY T. McKINNEY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY and the BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondents.

BRIEF

In Opposition to Writ of Certiorari of Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

This respondent, Brotherhood of Railway Clerks, etc., prays that writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on December 22, 1956.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 240 F. 2d 8 and is set out verbatim in the Petition.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether under Section 9 of the Universal Military Training and Service Act of 1951 petitioner, upon his return from military service, was entitled to promotion to a new position which he **might** have achieved had he remained in the continuous employment of the carrier but to which he has no fixed, certain, established or contractual right.

STATUTE INVOLVED.

The Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, and particularly Sec. 9 thereof.

STATEMENT OF THE CASE.

Any inaccuracies on the part of Petitioner in his summary of the Complaint below, which was dismissed, need not be dwelt upon here because the Complaint (R. 2, 3, 4, 5) is before the Court. Because of the substantial significance in this cause of certain provisions of the collectively bargained agreement here involved between Respondent carrier and Intervenor labor organization, we set out herein certain provisions thereof in Appendix A, pp. 9 to 12, infra.

ARGUMENT; REASONS FOR DENYING THE WRIT.

There is no basis whatever for the granting of a writ of certiorari or the interferring with the sound result achieved by both the District Court and the Court of Appeals below.

1. Arguments Advanced by Petitioner.

The Courts below did no more than correctly apply the established rule that the Universal Military Training Act assures the veteran's right to re-employment on the seniority escalator as to such position as he would have had as a matter of fixed right had he remained continuously in his civilian employment thus averting the veteran's "losing ground", being penalized or suffering in seniority status because of his military training. With equal force the cases hold that U. M. T. does not catapult the veteran into such conjectural or speculative promotions as he might or might not have achieved based upon his being considered fit and able to fill a job which chanced to open.

The contract here involved clearly prescribes that plaintiff had and has no right to the position, seniority and pay claimed. Rule one (1) divides clerks into several groups and Rule one (1) (3) (A) expressly provides that promotions are confined to an intra-group basis save that Group two (2) employees, based on fitness and ability, will be given preference over non-employes in the assignment to Group one (1) positions. Rule four (4) establishes that an employee's seniority in any branch or class commences when pay starts and under Rule five (5) the exclusive determination of fitness and ability is vested in the appointing officer. Hence, the contract pleaded and relied upon by plaintiff gives him no absolute, fixed or certain right, predicated upon seniority alone, to promotion to Group one (1), but rather extends to him only a limited prefer-

ence to Group one (1) promotion, carefully restricted to a fitness and ability basis. The conjectural possibility that plaintiff might have been promoted to Group one (1) had he not been in the military service, is not enough to entitle him to relief under the Act relied upon.

Our position is unqualifiedly upheld by the guiding principles stated in **Fishgold v. Sullivan Drydock and Repair Corporation,** 328 U. S. 275; **Meehan v. National Supply Company,** 160 F. 2d 346 (C. A. 10, 1947); **Oil Workers v. Sinclair Refining Company,** 171 F. 2d 192 (C. A. 5, 1948); **Raulins v. Memphis Union Station Company,** 168 F. 2d 466 (C. A. 6, 1948); **Hewitt v. System Federation,** 161 F. 2d 545 (C. A. 5, 1947).

Petitioner here seeks to establish a principle far beyond the range of the law or reason, i. e., that the returning veteran is entitled under U. M. T. to such job as he probably would have attained had he not gone into military service even though he had no right to same. The cases cited by petitioner do not spell out that extra-legal result. **Oakley v. Louisville & N. R. Co.,** 338 U. S. 278, 94 L. Ed. 87 (1949), at most holds that the expiration of the one year statutory period did not terminate the veteran's reemployment or other rights under the act. **Diehl v. Lehigh Valley Railroad Co.,** 348 U. S. 960, 99 L. Ed. 749 (1955), a memorandum opinion, indicates that a union contract executed after a veteran's return from service could not, by requiring certain periods of temporary service as a qualification for promotion defeat the veteran's rights under the Selective Service Act. **Morris v. Chesapeake and Ohio Railway Company,** 171 F. 2d 579 (C. A. 7, 1949), held merely that the qualified veteran was excused from "bidding in", during the service period, a job to which his seniority clearly entitled him, and that he could do so upon his return from service. Other cases relied upon by Petitioner are equally unrelated to the fallacious proposition asserted by him.

We urge that this Court disregard petitioner's improper reference to 150 alleged pending cases involving the application of the "escalator principle". Not only is this reference beyond the record but there is no scintilla of indication that the ruling in this cause has any bearing whatever on those vaguely referred to cases.

The unique and unusual circumstances required to warrant the issuance of a writ of certiorari simply do not exist here. The Court of Appeals adhered to principles established by this Court following the language and spirit of the statute as it has been interpreted by the Courts. Unless the Universal Military Training and Service Act is to be converted into a massive guessing game as to how far a veteran might have gone save for his service, the writ must be denied and the sound result achieved below must be permitted to stand.

2. Further Considerations Which Bar the Relief Sought by Plaintiff.

Were the petitioner not barred from proceeding herein for the reasons assigned by the Court of Appeals, the petition should have been dismissed and accordingly a writ of certiorari should be denied because of the following valid and compelling factors.

A. The District Court lacked jurisdiction over this action because exclusive jurisdiction over the Parties and the subject matter is vested in the National Railroad Adjustment Board by the Railway Labor Act (C. 691, 48 Stat. 1185), 45 U. S. C., Ch. 8, Secs. 151-188, no part of which was repealed by the Universal Military Training and Service Act. Inherent in the demand of the Complaint is the requirement that the District Court **interpret** the agreement and adjudicate Petitioner's grievance. The Railway Labor Act vests exclusive jurisdiction to deter-

mine precisely those issues in the National Railroad Adjustment Board. A series of authoritative decisions of the Supreme Court and other appellate courts have firmly established that the Board's exclusive jurisdiction cannot be encroached upon by the Courts and that its processes are, in effect, a continuation of the contract negotiations and administration. It has uniformly been held that the matters within the province of the Board's jurisdiction cannot be determined by the Courts even though there is some jurisdictional base which, but for the Railway Labor Act, would warrant the assumption of jurisdiction by the Courts.

This Court in **Slocum v. D. L. & W. R. R. Co.**, 339 U. S. 239, 94 L. Ed. 795 (1950), stated:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

Again, in **O. R. C. v. Pitney**, 326 U. S. 561, 90 L. Ed. 318 (1945), this Court said:

> "Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave minimum responsibility to the Courts."

The Universal Military Training and Service Act neither expressly or impliedly repealed nor carved out an exception to the Railway Labor Act and when the issue has been considered by the Courts it has been held that, where applicable, Railway Labor Act procedures are a condition precedent or a bar to action under U. M. T., **Willoughby v. A. T. & S. F. Railway Company**, 14 Labor Cases, No. 64,464 (1948, D. C. Kan.). Hopeless confusion and obliteration of the salutary purposes of the Railway Labor Act

would flow from the sustaining of plaintiff's position. It is fundamental that repeal of statutes by implication is not favored in law and will not be upheld unless the repugnance or inconsistency is so clear and plain as to be beyond the range of reconciliation. **Arthur v. Homer**, 96 U. S. 137, 24 L. Ed. 811 (1877). Furthermore a general act (U. M. T.) does not repeal a specific or particular act, (Railway Labor Act) unless same is done expressly. **Ex parte Kan-gi-shun-ca**, 109 U. S. 556, 27 L. Ed. 1030, 35 S. Ct. 396 (1883).

B. Petitioner, under no circumstances, would be entitled to relief because his complaint on its face shows that he failed to exhaust or even invoke the administrative and grievance procedures of Rule 27, Rule 31, et seq. of the collectively bargained agreement. This is a prerequisite to action at law. **T. W. A. v. Koppal**, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906 (1953). Petitioner cannot pick and choose between the provisions of the contract, tenaciously relying on some but disregarding those which do not appeal to him.

C. Petitioner by waiver and laches, as disclosed on the face of the complaint, further establish that the complaint was providently dismissed. Although an abstract allegation of unexplained "protest" is made, he alleges that he took no other steps to assert his rights, he went to work on the assigned basis, filed no suit, failed to invoke the contractual grievance procedures and thus for one full year, led Respondents to believe that he acquiesced and concurred in his assignment and seniority date. Veterans' rights under U. M. T. may be waived, **Hastings v. Reynolds Metal Co.**, 165 F. (2d) 483 (C. A. 7, 1947); **Walsh v. Chicago Bridge and Iron Co.**, 90 F. Supp. 322 (D. C. Ill., 1950), and same patently was done here.

Hence, for those supplemental reasons, the writ must also be denied.

CONCLUSION.

For the reasons stated, we submit that the Petition for a Writ of Certiorari should be denied and it is that action which we respectfully urge on this Court.

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Attorneys for Intervenor-Respondent, Brotherhood of Railway Clerks, etc.

APPENDIX "A."

SIGNIFICANT EXCERPTS FROM COLLECTIVELY BARGAINED AGREEMENT HERE INVOLVED.

* * * * * * * *

Employes Affected—Rule 1.

(1) Clerks, Sub-Foremen, Assistant Foremen, Sub-Storekeepers, City Ticket Agents (Traffic Department).

Qualifications—Clerks—Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, dictating letters, vouchers, bills, statements, reports and similar work, including employes who examine or verify such work, also typists, comptometer operators and calculating machine operators, shall be designated as clerks.

(2) Other office and station employes, such as office boys, messengers, helpers, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, elevator operators, ticket and way-bill assorters, machine operators, employes operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers.

(3) Station, platform, warehouse, transfer, dock store room, stock room and team track freight or material handlers or truckers, and others similarly employed; car sealers, scalers, fruit and perishable inspectors, stowers, stevedores, breakout, loaders, locators, coopers and other similarly employed; and laborers employed in and around stations, offices, storehouses and warehouses.

(A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined

to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).

* * * * * * *

(C) Seniority of employes will be restricted to the respective group in which employed, except that seniority accumulated in groups two (2) or three (3) will be recognized in reduction of forces in the event employes holding seniority in group two (2) or three (3) positions, are laid off account of reduction in forces, such employes will be privileged to exercise their seniority in groups from which promoted.

* * * * * * *

Seniority.

Seniority Datum—Rule 4.—Seniority begins at the time the employe's pay starts in the respective branch or class of service and on the seniority district on which employed, transferred or promoted, and when employes are assigned to positions as provided for in Rule 10 of the agreement, or other rules which presuppose regular employment.

* * * * * * *

Bulletin—Rule 10.—New positions or vacancies will be promptly bulletined in places accessible to all employes affected for a period of five (5) days in the seniority district where they occur. Bulletin to show location, title, hours of service and rate of pay. Employes desiring such positions will file their application with the designated official within that time, the name of the successful applicant will be posted for a period of five (5) days where the position was bulletined and a copy furnished to interested chairmen. This rule does not apply to employes in group three (3) of Rule 1.

Under this rule positions should be bulletined for bid not later than three (3) days after position has been vacated by regularly assigned employe.

Physical assignment to positions which have been bulletined for bid will be made not later than three (3) days after the expiration of the time limit under this rule, except where longer period is required extension will be made by agreement between the carrier and local or division chairmen, representatives of employes.

* * * * * * *

Bidding After Absence—Rule 15.—An employe returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner.

* * * * * * *

Positions Abolished—Rule 23.—Employes whose positions are abolished may exercise their seniority rights over junior employes, and other employes affected may exercise their seniority in the same manner, subject to the provisions of Rules five (5) and eighteen (18).

Employes who exercise seniority account of reduction in force or positions abolished within seven (7) days from such date notify the supervising officer of their desire to exercise their seniority on a position occupied by a junior employe. The supervising officer will within three (3) days either accept or reject the application of the employe desiring to exercise seniority.

Employes whose application to exercise seniority has been rejected will within three (3) days designate his second choice, and his application will be considered in accordance with the provisions of these rules.

Employes whose applications to exercise seniority have been rejected may appeal in accordance with Rule 31 of the agreement.

An employe whose application to exercise seniority has been rejected and who designates a second choice does not lose the right to appeal as provided for in Rule 31.

Any employe whose position has been abolished, or who is displaced as a result of force reduction, desiring leave of absence, will, prior to being granted a leave and within seven days after abolishment or displacement, designate in writing the position upon which he desires to place himself. The employing official will, upon such notification, notify the employe affected. The employe affected may, if he so desires, exercise seniority in accordance with prevailing rules, or he may retain the position held by him during the time that the employe granted the leave is absent from the position. Upon return of employe granted the leave the employe displaced may exercise seniority.

In the event the employe granted the leave fails to return at expiration of same, the employe holding the position will be considered as having never been displaced.

* * * * * * *

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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 93

HENRY T. McKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

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OCTOBER TERM, 1956

No. 849

HENRY T. McKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the respondent, Missouri-Kansas-Texas Railroad Company, and prays that the petition filed herein for a writ of certiorari be denied.

QUESTION PRESENTED

Petitioner has inaccurately stated the question presented. He says the question is "Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he

would have obtained it had he remained in the continuous employment of the respondent." In effect, petitioner assumes the ultimate question at issue, or begs the real question. We believe the real question is whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right under the collective agreement to be assigned, upon his return from military service, to a position in Group 1 classification.

STATEMENT OF THE CASE

This action was instituted against Missouri-Kansas-Texas Railroad Company by Henry T. McKinney, an honorably discharged veteran in the railroad's employ, to enforce reemployment rights under Section 9 of the Universal Military Training and Service Act of 1951, *65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5* (R. 2-5). On its motion, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was granted leave to intervene (R. 12-14). On March 14, 1956, the United States District Court for the Eastern District of Oklahoma dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted (R. 15-16). The opinion of the United States Court of Appeals for the Tenth Circuit, affirming, is reported at *240 F. 2d 8*, and its judgment was entered December 22, 1956. The allegations of the complaint, and the proceedings below, may be summarized as follows:

Railroad Company has a labor agreement with Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employees, which has been in effect since August 1, 1925, and that organization represents all classes of clerical, office, station and storehouse employees, including the petitioner.

Employees are divided into Groups 1, 2 and 3, with seniority rights only within their respective group [Rule 1(3)(C), R. 6].

On September 25, 1950, petitioner was regularly employed in the capacity of Relief Clerk-Chief Caller, a position within Group 2 classification of the agreement [Rule 1(2), R. 6].

Petitioner entered the military service, and was discharged September 27, 1952.

While petitioner was in military service, the following positions in Group 1 classification were bulletined, and the positions were filled by non-employees as follows:

Date of Bulletin	*Position*	*Person employed*	*Date started work and date assigned seniority*
9- 8-52.	Bill Clerk	R. F. Fabian	9-15-52
9-10-52	Assistant Cashier	C. B. McCuan	9-22-52

Petitioner was separated from military service effective September 27, 1952, requested re-employment on October 1, 1952, was permitted to take the position of Assistant Cashier, a Group 1 position, on October 7, 1952, first performed compensated service in that position on October 7, 1952, and was assigned seniority in Group 1 as of October 7, 1952. The complaint alleges the petitioner "duly protested" that his seniority date was not correctly

fixed and should have been fixed as of September 8, 1952 or September 10, 1952, the dates the positions in Group 1 were bulletined.

On September 4, 1953, the position of Assistant Cashier was abolished and on September 5, 1953, petitioner was assigned the position of Relief Clerk-Chief Caller, which position he has since held. The complaint alleges that on September 2, 1953 the petitioner "duly requested" he be permitted to exercise superior seniority to R. F. Fabian and displace Fabian as Bill Clerk, but was refused on the ground Fabian had a superior seniority rating.

Petitioner seeks relief on two grounds: That his seniority be fixed as of September 8, 1952, or September 10, 1952, the dates the Group 1 positions were bulletined while petitioner was in the military service, which would give him a seniority rating superior to Fabian and which would permit petitioner to displace Fabian in the position of Bill Clerk; and petitioner seeks the further relief that he be permitted to recover as damages the difference in wages between the Group 1 position of Bill Clerk and the Group 2 position of Relief Clerk-Chief Caller since September 5, 1953.

ARGUMENT

We believe petitioner has reasoned on a false premise, and therefore his conclusions are not correct. The collective agreement, attached to and being an essential part of the complaint, contains certain rules which petitioner con-

tinues to ignore, and which rules preclude the granting of the relief sought (R. 5-9).

Group 1 employees are clerks, sub-foremen, assistant foremen, sub-storekeepers, and city ticket agents, and are all clerical employees who regularly devote not less than 4 hours per day to the enumerated types of highly skilled clerical work, and they are designated as Clerks [Rule 1(1), R. 5].

Group 2 employees are classified as other office and station employees, and those in this classification perform duties requiring varying degrees of skill, and they include office boys, messengers, train announcers, gatemen, train and engine crew callers, telephone operators, elevator operators, and many others [Rule 1(2), R. 6]. We believe it is significant to note at the outset that there is little if any relation between the types of duties in the two Groups, which we believe is important in view of petitioners' contention that he was entitled to be "promoted" from Group 2 to Group 1.

Rule 1(3)(A), (R. 6) provides expressly that "promotion will be confined to the group herein named" (Group 2), and when considering the obvious difference in types of employees who would be reasonably required to perform the wholly unrelated duties in each group, it becomes clear why any right of promotion should be so confined or limited. The rule does provide that Group 2 employees will be given preference over non-employees in the assignment to Group 1 positions, based on fitness and ability. It seems clear that moving a Group 2 employee to a Group 1

position is exactly what the rule states—an assignment to that position—and not a promotion in the usual sense of the word, which ordinarily depends largely if not entirely on experience in the same type work. But this rule does not mention seniority, only fitness and ability which is an exclusive prerogative of management. How could it be argued reasonably or logically that an elevator operator or train announcer could demonstrate the capacity or ability to operate a calculating machine or operate a city ticket agency?

Petitioner states on page 3 of the petition that under Rule 15 of the agreement an employee returning after a leave of absence had the option of either (1) resuming his former position or (2) "exercising seniority rights to obtain any position bulletined in his absence" (R. 7), completely ignoring Rule 1(3)(C) which expressly provides in part "seniority of employees will be restricted to the respective group in which employed" (R. 6). Manifestly petitioner, under Rule 15, could exercise only the seniority to which he was entitled under Rule 1(3)(C), namely Group 2 seniority. It follows his options were either (1) resuming his former position in Group 2 or (2) exercising seniority rights to obtain any Group 2 position bulletined in his absence.

Petitioner complains that he was not permitted to displace Fabian on the sole ground he had been assigned a seniority date of October 7, 1952. This would imply some arbitrary action on the part of this respondent, when, as a matter of fact, petitioner first performed compensated

service in Group 1 on October 7, 1952, therefore was entitled to seniority only as of that date under Rule 4, reading in part "Seniority begins at the time the employe's pay starts in the respective branch or class of service" (R. 6).

The Act of Congress here invoked protects the returning service man against loss of seniority rights, including all rights which flow as the result of seniority, but to determine those rights we must turn to the provisions of the collective agreement. The Courts below did not ignore the "escalator principle," as petitioner claims, nor did they apply any new and strange "absolute right" test, but on the contrary they followed precedent. The opinion of the Circuit Court largely turns on a construction of Rule 1(3)(A), supra, and in effect holds the right of petitioner to a Group 1 position must come from that rule, if at all. The opinion, reported at *240 F. 2d 8, 10*, states:

> "On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service. (Citing Oakley v. Louisville & N. R. Co., 338 U. S. 278; Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, and other cases.) This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.
>
> "To determine where he would be had he not entered the service and had he remained with the company,

we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service. (Citing Trailmobile Company v. Whirls, 331 U. S. 40.) The collective bargaining agreement classifies the employees into three Groups. Under the agreement the *rights of the employees predicated upon seniority are expressly confined to members within each Group*, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however upon a determination that the employee seeking such advancement is fitted and qualified for such position. *Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants.* He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service." (Emphasis ours.)

There is no doubt that the decisions of this Court in *Oakley v. Louisville & N. R. Co., 338 U. S. 278; Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U. S. 275; Trailmobile Co. v. Whirls, 331 U. S. 40,* and *Diehl v. Lehigh Valley R. Co., 348 U. S. 960,* have firmly established the so-called 'escalator principle," and it may be that Section 9 of the Universal Military Training and Service Act amounts to legislative approval or codification. Neither here nor in the Courts below do we question the soundness of that established principle. The Circuit Court opinion follows these and other cases relied upon by petitioner, and we believe correctly holds the fact situation as disclosed

by the allegations of the complaint, considered in the light of the collective agreement attached thereto, failed to state a claim upon which relief could be granted. We believe the key to matter is the conclusion of the Circuit Court that "Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants." This being true, absence in military service had nothing to do with petitioner failing to be assigned the Group 1 position.

In the *Oakley* case, supra, this Court clearly defined the "escalator principle" as meaning the returning veteran is entitled to restoration *(338 U. S. at 283)*:

> "'* * * not * * * the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have had if he had remained continuously in his civilian employment."

In view of its determination that McKinney would not be entitled to the asserted right had he remained continuously in his civilian employment, the judgment of the Circuit Court does no violence to the *Oakley* rule, and it cannot fairly be contended the Tenth Circuit held the "escalator principle" inoperative here.

The case of *Bond v. Tennessee Coal, Iron & R. Co., 73 F. Supp. 333*, is closely in point on the facts. There, an assistant payroll clerk entered military service, and on being discharged sought reemployment as payroll clerk,

which would be an advanced position. The collective agreement there provided for promotion on the basis of "ability, physical fitness, and seniority," but relief was denied. The Court concluded that Bond had no fixed or absolute right to promotion under the rule in the collective agreement, that the right of promotion did not depend solely on seniority, and while it may have been the custom to promote the assistant payroll clerk with greatest seniority there was no right of promotion which could be enforced under the Act of Congress. If Bond, with senior seniority under a collective agreement making seniority a factor, was not entitled to relief, we submit that petitioner, working under a collective agreement where seniority is not a factor, could not be entitled to relief.

The case *Raulins v. Memphis Union Station Co. (C. A. 6), 168 F. 2d 466,* involves essentially the same question as is presented here. There, the employees in the particular craft were divided into four groups, with seniority rights restricted to the particular group. One entered military service while employed in one group, and on return sought assignment to a higher classified group on the theory he would have been promoted had his military service not broken his continuous employment. There, the collective agreement provided the employee with greatest seniority in his group or craft would have preference in filling vacancies in higher groups or crafts, with ability also a factor. The Court held that Raulins, at the time he entered the military service, had no fixed right to promotion under any custom or contract, and that while the oldest em-

ployee in point of service was usually promoted, other factors required consideration, and while the Act guaranteed him seniority within his group, it did not guarantee him promotion to vacancies occurring in a higher group.

Additional authorities concerning the "right of promotion" question are collected in the annotation appearing at *29 A. L. R. 2d 1316-1319*. The analysis of a large number of those cases would serve no useful purpose here, and we deem it sufficient to say that but one line of reasoning runs through all these cases, the right of promotion, or assignment to a higher classified position, was not guaranteed by the Act of Congress unless it is an absolute and unqualified right under the collective agreement.

It is not contended that petitioner actually suffered a loss of seniority by reason of his military service, but on the other hand it is admitted his present seniority date in Group 2 is the same as when he entered military service. While serving in the Group 1 position to which he was perhaps erroneously assigned when he returned from service, petitioner continued to accumulate seniority in both groups, and when the Group 1 position was abolished he was restored to the Group 2 position to which his seniority in that group entitled him. Thus petitioner has received full benefits of the "escalator principle," and therefore the *Oakley* and *Trailmobile* cases, supra, have no application, since they deal with loss of seniority.

The case *Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275*, is frequently cited as a leading case. Fishgold sought protection under the Act to give him greater seniority rights because of military service, and in rejecting his claim this Court stated *(328 U. S. at 286)*:

> "* * * We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority means no more."

All later cases on the point deny relief where a step-up, or seniority gain, sometimes referred to as "super seniority," is claimed by the returning veteran. In concluding as they did that to grant the relief here sought would be to grant petitioner a priority gain, the Courts below followed the decisions of this Court.

Petitioner makes much of the fact he was assigned a Group 1 position upon return from military service, and he reasons he thereby in some manner "qualified" for a higher position which was bulletined during his absence. He studiously avoids answers to his contention which were briefed and argued in both Courts below. The opinion of the Circuit Court recognizes the fact this respondent erroneously permitted petitioner to displace McCuan, but observed the rights of McCuan are not involved. We know of only one reported case on the precise point. In *Freeman v. General Motors Corp., 86 F. Supp. 527*, the Eastern

District of Michigan held that when an employer, because of mistake of law, gave veterans greater benefits as to job preference than those contemplated by the Act, the employer was not foreclosed from adopting a subsequent authoritative interpretation of the Act. It would appear this respondent may have been over zealous in protecting the rights of petitioner, and we submit the sound reasoning in the *Freeman* case should be approved by this Court.

If, as contended by petitioner, his "fitness and ability" was determined on October 1, 1952, when he was assigned to the Group 1 position of "assistant Cashier," it does not follow that his fitness and ability to perform any other Group 1 position was thereby determined, but that would still remain a decision for management. He may or may not have been determined fit and able to handle the duties of "bill clerk" (the position then and now occupied by Fabian) or any one of a number of other positions in Group 1. The most that can be said, or established at a trial on the merits, is that if petitioner had remained continuously in respondent's employment he may or may not have been assigned to the position of bill clerk he now seeks. We submit that the Courts below correctly concluded the "escalator principle" guarantees to the returning veteran only such absolute and unqualified rights as could be found in the collective agreement.

Petitioner relies heavily on the case *Diehl v. Lehigh Valley R. Co., 348 U. S. 960*, but that case deals with absolute and unqualified rights under the collective agreement, and is clearly not in point. In the *Diehl* case the

collective agreement provided that a car man helper, after 1160 days' service, would be entitled, absolutely and without considering other factors within employer discretion, to the higher classification of car man mechanic. There the "escalator principle" intervened to protect the "absolute right" of the returning veteran to the position he would unquestionably have obtained, except for military service, based solely on seniority.

The case *Morris v. Chesapeake & O. Ry. Co., 171 F. 2d 579 (C. A. 7)*, is likewise not in point, and the Court distinguished between this case and the *Raulins* case, supra, for the reason the factual situations were different. In the last paragraph the Court in the *Morris* case pointed out "both the terms of the union agreement and the custom decreed that dispatchers be taken after qualification according to their seniority from the telegraphers' roster. Morris, as the senior on the telegraphers' roster, was entitled by that fact to be advanced to dispatcher." The *Morris* case simply recognizes the "escalator principle," which applies only to prevent loss of seniority or loss of rights based on seniority.

Petitioner complains that his case was dismissed and he was deprived of an opportunity to be heard on the merits, but he overlooks the fact his rights are fixed by the collective agreement which was before the Court, and that evidence could not enlarge upon rights there fixed. In rejecting this argument the Courts below concluded no other result could be reached, whether based on the pleadings or on evidence submitted at a trial on the merits.

The late case *Mann v. Crowell-Collier Publishing Co. (C. A. 6), 239 F. 2d 699* is clearly distinguishable, since there the Court was dealing with fixed advancement rights under the collective agreement, based solely on seniority. There the agreement provided that a photo-engraver apprentice with six years' service should be classified as journeyman, and except for military service Mann would have been entitled without question to the advancement.

CONCLUSION

We submit that petitioner misconceives his rights under the collective agreement; that he would have had no fixed or absolute right to be assigned a Group 1 position had he remained in continuous employment; and that his military service and honorable discharge therefrom cannot be held to enlarge those rights.

The opinion and judgment of the Circuit Court is in full accord with decisions of this Court and correctly construes the Act of Congress; fully protects the rights of petitioner under the "escalator principle"; and affords to petitioner every right to which he is entitled under the collective agreement.

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Denison, Texas.

CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of the foregoing Opposition to Petition for Writ of Certiorari upon each of the following persons, viz.: J. Lee Rankin, Solicitor General, Washington 25, D. C., and Carroll J. Donohue, 506 Olive Street, St. Louis 1, Mo., by mailing a copy to each of them by first-class mail and depositing said copies in the United States mail, properly addressed to each of them, with postage prepaid.

Dated April 20, 1957.

Of Counsel for Respondent,
Missouri-Kansas-Texas
Railroad Company.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

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BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

QUESTION PRESENTED

Petitioner has, we believe, inaccurately stated the question presented here to be:

> "Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to senior-

ity in the new position from the date he would have obtained it had he remained in the continuous employment of the respondent."

In so stating the question petitioner assumes the ultimate question at issue, or begs the real question. We believe the question presented is in two parts, or that two questions are presented, and that fairly stated they are:

(a) Whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right by virtue of Section 9 of the Universal Military Training and Service Act of 1951 and under the collective agreement, upon his return from military service, to be assigned to a position in Group 1 classification;

and

(b) Whether an employer, because of mistake of law, who gives an employee returning from military service greater benefits as to job preference than is contemplated by Section 9 of the Universal Military Training and Service Act of 1951 and by the collective agreement, is thereby foreclosed from adopting a subsequent authoritative interpretation of the Act and the agreement.

STATEMENT

This action was instituted against the Missouri-Kansas-Texas Railroad Company by Henry T. McKinney, an honorably discharged veteran, to enforce what he believes to be his reemployment rights under *Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5* (R. 2-10). On its motion, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, was granted leave to intervene (R. 12-14). The United States District

Court for the Eastern District of Oklahoma dismissed the action without opinion, on the ground the complaint failed to state a claim upon which relief could be granted (R. 15-16). The United States Court of Appeals for the Tenth Circuit affirmed on appeal, *McKinney v. Missouri-Kansas-Texas R. Co., 240 F. 2d 8* (R. 17-22). The allegations of the complaint may be summarized as follows:

Railroad Company, respondent, has a collective bargaining agreement with Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, which has been in effect since August 1, 1925, and that organization represents all classes of clerical, office, station and storehouse employees, including petitioner.

Employees are divided into Groups 1, 2 and 3, with seniority rights restricted to the respective Group in which employed [Rule 1(3)(C), R. 6].

On September 25, 1950, petitioner was regularly employed in the capacity of Relief Clerk-Chief Caller, a position within Group 2 classification of the agreement [Rule 1(2), R. 6].

Petitioner entered military service September 26, 1950, and was discharged therefrom September 25, 1952.

While petitioner was in military service, the following Group 1 jobs were bulletined and the positions were filled by non-employees as follows:

Date of Bulletin	*Position*	*Person Employed*	*Date pay started and assigned seniority*
9- 8-1952	Bill Clerk	R. F. Fabian	9-15-1952
9-10-1952	Assistant Cashier	C. B. McCuan	9-22-1952

Petitioner was separated from military service September 25, 1952, on October 1, 1952 requested re-employment, and on October 7, 1952 was permitted to take the position of Assistant Cashier, a Group 1 position, started work on such position and pay started and he was assigned seniority in Group 1 as of October 7, 1952. The complaint alleges that petitioner "duly protested" that his seniority date was not correctly fixed and should have been fixed as of September 8, 1952 or September 10, 1952, the dates the positions in Group 1 were bulletined, rather than September 15, 1952 or September 22, 1952, the dates those employed started work on the Group 1 jobs and the dates their pay started. (Rule 4, R. 6).

On September 4, 1953, the position of Assistant Cashier was abolished, and on September 5, 1953, petitioner was assigned the position of Relief Clerk-Chief Caller, which position petitioner held when he entered military service, and which position he has since held. The complaint alleges that on September 2, 1953, petitioner "duly requested" he be permitted to exercise superior seniority to R. F. Fabian and displace Fabian as Bill Clerk, but was refused on the ground Fabian had a superior seniority rating.

Petitioner seeks relief on two grounds: That his seniority be fixed as of September 8, 1952, or September 10, 1952, the dates the Group 1 jobs were bulletined, which would give him a seniority rating superior to R. F. Fabian who was assigned seniority as of September 15, 1952, when he first performed services as Bill Clerk and on which date his

pay started. Petitioner seeks the further relief that he be permitted to recover as damages the difference in wages between the Group 1 position of Bill Clerk and the Group 2 position of Relief Clerk-Chief Caller since September 5, 1953.

SUMMARY OF ARGUMENT

Section 9 of the Universal Military Training and Service Act of 1951, requires that an employee returning from military service be restored to his employment without loss of seniority, and with such status in his employment as he would have enjoyed if he had remained continuously in his employment. The applicable provisions of the collective agreement fix the rights of all employees including those returning from military service, and the Act of Congress may be invoked to protect employment rights thus determined, but not to enlarge such rights or grant super seniority rights.

Petitioner, at the time he entered military service, was a Group 2 employee of respondent Railroad Company, under a collective agreement which restricted seniority to the respective Group in which employed [Rule 1(3)(C), R. 6], except Group 2 employees have a preference over non-employees in filling vacancies in Group 1 [Rule 1(3)(A), R. 6], based on fitness and ability, with seniority in Group 2 not a factor. Thus, the decision as to whether a Group 2 employee will be assigned to a Group 1 position is the exclusive prerogative of the employer.

While petitioner was absent in military service, two Group 1 positions became vacant, were bulletined by the employer, and were filled by non-employees. Provisions of the collective agreement would permit petitioner to apply for either vacant position had he not been absent in military service, but having no seniority in Group 1 which might be exercised, petitioner was not entitled as a matter of contractual right to be placed in either Group 1 position.

Upon return from military service, petitioner was assigned a Group 1 position under a mistake of law. Such improper assignment did not prohibit the employer from subsequently adopting a correct interpretation of the collective agreement. When the Group 1 position was abolished, petitioner was properly assigned to the Group 2 position he held when entering military service, with the same Group 2 seniority he held when entering military service, in full compliance with the "escalator principle" of the Act.

The complaint filed by petitioner alleges, in effect, that under applicable provisions of the collective agreement he was entitled, absolutely and without question, to be advanced to Group 1 classification on his return from military service. He now argues that he could establish at a trial on the merits his "fitness and ability" for a Group 1 position, although that is held to be an employer decision; and that he may or may not have been, or probably would have been, advanced to a Group 1 status, or that custom decreed such advancement, although the authorities universally hold the Act may be invoked to protect definitely ascertainable employment rights, as distinguished from probabilities. These allegations in petitioner's complaint, which are at variance

with clear provisions of the collective agreement attached to the complaint, may not be held to state a claim upon which relief could be granted, and dismissal of the complaint was proper.

ARGUMENT

We believe petitioner has reasoned on a false premise, and has reached an erroneous conclusion. His statement of the question presented clearly shows that he continues to assume the ultimate question at issue. We believe the crucial question is whether petitioner, a Group 2 employee, would have been entitled, absolutely and without question or qualification, to have obtained a job in the Group 1 classification had his employment with the Railroad Company not been interrupted by military service.

In the belief it may be helpful, we state again the question as tendered by petitioner, pointing out in footnotes the obvious error in petitioner's reasoning, as follows:

> Whether, under Section 9 of the Universal Military Training and Service Act of 1951, petitioner, *who had been promoted by respondent to an advanced position upon his return from military service*[1] was entitled to seniority in the new position from the date he would have had the *opportunity to qualify*[2] for the position had he remained in the continuous employment of the respondent.

[1] Petitioner assumes that he had a right under the collective agreement to be assigned to the advanced position, and was rightfully advanced, and ignores the crucial question of his *right* to be assigned. Both the District Court and the Circuit Court of Appeals took the view petitioner was assigned to the advanced position under a mistake of law, and held against petitioner on the crucial question of his right to be so assigned.

[2] Petitioner refers to the opportunity rather than a contractual right. The collective agreement provides no right or opportunity to qualify, such as apprenticeship or examination, leaving determination of that question to employer discretion.

We believe our statement of the question, or questions, fairly presents the issue, and we submit argument on the two questions, or two parts of the question.

(a) Whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right by virtue of Section 9 of the Universal Military Training and Service Act of 1951 and under the collective agreement, upon his return from military service, to be assigned to a position in Group 1 classification.

We seem to be in agreement with petitioner that Section 9 of the Universal Military Training and Service Act protects the returning service man against loss of seniority rights, but to determine those rights we must turn to the provisions of the collective agreement. We submit the District Court correctly held the complaint did not state a claim upon which relief could be granted, and properly dismissed the action, and the Court of Appeals correctly affirmed.

Rule 1(3)(A) (R. 6), provides that promotion will be confined to the several groups in which employees — i.e. Group 1, Group 2 and Group 3 — except that Group 2 employees will be given preference over non-employees in the assignment to Group 1 jobs, on the basis of fitness and ability. It seems clear that any right to promotion, or to be assigned to a higher job classification, must be found in this rule. It is equally clear that no such right is here granted. A *preference* over non-employees is granted to Group 2 employees, *based on fitness and ability*, and nothing more. It is significant to note that *seniority* is not men-

tioned. It is our position that questions of fitness and ability are within the exclusive prerogative of the employer.

The case of *Bond v. Tennessee Coal, Iron & R. Co. (1947 D. C. Ala.), 73 F. Supp. 333*, is closely in point. There, an assistant payroll clerk entered military service, and on being discharged sought reemployment as payroll clerk, which would be a promotion. The collective agreement there provided for promotion on the basis of "ability, physical fitness, and seniority," but the relief sought was denied. The Court concluded that Bond had no fixed or absolute right to promotion under the rule in the collective agreement, that the right of promotion did not depend *solely* on seniority, and while it may have been the custom to promote the assistant payroll clerk with greatest seniority there was no right of promotion which could be enforced by the Act. There, seniority was a factor, but not the controlling factor since there were other factors within employer discretion, and military service had nothing to do with Bond's failure to be promoted. Had he remained continuously in defendant's employment he would have had no contractual right to an advanced position, and therefore had no such right upon his return from military service. If Bond, with senior seniority under a collective agreement making seniority a factor, was not entitled to an advanced position, how could it be said that petitioner, working under a collective agreement where seniority is not a factor, could be entitled to any of the relief he seeks here?

In the case *Meehan v. National Supply Co. (1947, C. A. 10), 160 F. 2d 346*, the Court affirmed judgment denying

relief sought under alleged reemployment rights. In holding Meehan was not entitled to be reemployed in a position created while he was in military service, or in other words denying the right to an advanced position, the Court stated the rule in these words:

> "The Act is to be construed liberally in order to effectuate the Congressional purpose, which was to safeguard the rights of those who entered the military service of their country and preserve to them the full benefits of the position which they occupied at the time for the period of time fixed in the Act. But this does not justify a strained construction of facts in order to give a returning veteran a higher position than the one he occupied at the time he entered the service, or a new position created after he was in the service."

The so-called "escalator principle" is not an enlargement of this rule, for to preserve the full benefits of the position the employee occupied at the time of entering military service, it would be necessary to preserve all rights that flow from that position, or that flow from seniority in that position.

The case of *Raulins v. Memphis Union Station Co. (C. A. 6), 168 F. 2d 466*, involves essentially the same "right to an advanced position" question as is presented here. There, the employees in the craft were divided into four groups, with seniority rights restricted to the particular group in which employed. Raulins entered military service while employed in one group, and on return sought promotion or assignment to a higher classified group on the theory he would have been promoted had his military service not broken his continuous employment. There, the collective

agreement provided the employee with greatest seniority in his group or craft would have *preference* in filling vacancies in higher groups or crafts, with ability also a factor. The Court held that Raulins, at the time he entered the military service, had no fixed right to promotion under any custom or contract, and that while the oldest employee in point of service was usually promoted, other factors required consideration, and while the Act guaranteed him seniority within his group, it did not guarantee him promotion to vacancies occurring in a higher group.

Additional authorities concerning the "right of promotion or assignment to higher classification" question are collected in the annotation appearing at *29 A. L. R. 2d 1316-1319*. The analysis of a large number of those cases would serve no useful purpose here, and we deem it sufficient to say that but one line of reasoning runs through these cases, the Act was not intended to do anything beyond preserving rights created under the collective agreement. If the agreement provides a right to advancement, such right is preserved. If the agreement provides something less than a *right*, such as the *preference over non-employees* to be found in the *Bond* and *Raulins* cases, supra, as well as here, the Act may not be relied upon to obtain the advanced position. The opinion of the Circuit Court in this case (R. 17, 21) refers to this *preference* as being a *qualified right*, and points out that "Had this vacancy ocurred while McKinney was in the employ of the company, he would not have had the *absolute* right to demand either of these positions over the non-employee applicants." Petitioner com-

plains this "absolute and unqualified right" test applied by the Circuit Court in some manner does violence to the "escalator principle," but it can readily be seen the application of such test merely limits the employee to what actually are rights under the collective agreement.

Petitioner does not contend that he suffered a "loss of seniority" by reason of his military service, but on the other hand it is admitted his present seniority date in Group 2 is the same as when he entered the military service. We submit that amounts to an admission that petitioner has received full benefits of the "escalator principle." Therefore, the cases *Oakley v. Louisville & N. R. Co., 338 U. S. 378,* and *Trailmobile Co. v. Whirls, 331 U. S. 40,* have no application, since they both deal with actual loss of seniority.

The case *Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275,* is frequently cited as a leading case. There Fishgold sought protection under the Act to give him greater seniority rights because of military service, and in rejecting his claim the Court stated *(328 U. S. 286):*

> "* * * We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran agains loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority means no more."

And in the same opinion, it was held *(328 U. S. 284-285):*

> "Thus (the veteran) does not step back on the seniority escalator at the point he stepped off. He steps back

> on at the precise point he would have occupied had he kept his position continuously during the war."

This rule was restated in *Oakley v. Louisville & N. R. Co.*, supra, when the Court stated *(338 U. S. 278, 283)*:

> "* * * (A)n honorably discharged veteran, covered by the statute, (is) entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."

Petitioner contends the more recent case *Diehl v. Lehigh Valley R. Co., 348 U. S. 960, reversing 211 F. 2d 95*, is dispositive of this case. We believe an analysis of the fact situation in that case, in the light of differences in the pertinent provisions called rules of the collective agreement, clearly demonstrates the error of petitioner's reasoning. Petitioner details most of the essential facts involved in the *Diehl* case at pp. 16-19 of the brief, but simple and controlling fact distinctions must be drawn. Diehl, an employee in the classification of car man helper, was on February 19, 1943, designated temporary car man mechanic, a higher classification, which higher classified position he held some 55 days, or until he entered military service on April 15, 1943. In 1945, being honorably discharged, Diehl resumed employment as temporary car man mechanic which was the position held when he entered military service. On March 1, 1949, a collective agreement was entered into providing a temporary car man mechanic, after 1160 days'

service, would be entitled, absolutely and without considering other factors within employer discretion, to the permanent classification of car man mechanic. Non-veteran temporary car man mechanics completed 1160 days' service prior to the date Diehl was able to do so, because his service was interrupted by military service. Diehl became a temporary car man mechanic on February 19, 1943, and his seniority date in such classification was February 19, 1943. The collective agreement provided that after 1160 days' service Diehl would be entitled to be classified a car man mechanic, and had he remained in continuous employment there could be no question about his right to the higher classification. The result of the *Diehl* case is simply to apply the "escalator principle," and a contrary conclusion would discriminate against the veteran, which is condemned by the *Fishgold*, *Oakley* and all other reported cases.

The distinctions are clear. Diehl had performed services in the higher classification, and thereby had acquired a seniority date in the higher classification prior to entering military service, but in this case the petitioner had not performed services in Group 1 before his military service. Under the collective agreement Diehl was entitled to promotion after 1160 days' service, and his right was based solely on length of service, but the collective agreement here does not provide for absolute rights to be advanced to the Group 1 classification, and seniority is not even a factor. We submit the *Diehl* case is not in point.

The case *Morris v. Chesapeake & O. Ry. Co., 171 F. 2d 579 (C. A. 7)*, is likewise not in point, and the Circuit

Court distinguished between this case and *Raulins v. Memphis Union Station Co.*, supra, for the reason the factual situations in the two cases were different. In the last paragraph of the opinion in the *Raulins* case the Circuit Court pointed out that in the *Morris* case "Both the terms of the union agreement and the custom decreed that dispatchers be taken after qualifications *according to their seniority* from the telegraphers' roster." Morris, as the senior on the telegrapher's roster, was entitled by that fact to be advanced to dispatcher. In the instant case, the collective agreement [Rule 1(3)(A), R. 6] does not provide for promotion, automatic or otherwise; seniority is not mentioned in the rule; and petitioner is not allegedy senior on the Group 2 roster. The *Morris* case simply follows the "escalator principle" to prevent loss of rights based on seniority alone.

The case *Conner v. Pennsylvania R. Co., 177 F. 2d 854 (C. A. D. C.)*, is another case dealing with "rights" under the collective agreement, and does not deal with something less, such as a "preference" without fixed or absolute rights to be advanced. There the collective agreement gave freight trainmen the absolute right, on the basis of seniority alone, to transfer if they desired passenger train service. The opinion in the *Conner* case *(177 F. 2d 858)* distinguishes the *Raulins* case as dealing with an employee having an absolute right to promotion.

The case *Bostain v. Seaboard Air Line R. Co., 211 F. 2d 867 (C. A. 4)*, deals with rights to be advanced to higher classified position on the basis of seniortiy alone, or time

spent in a lower classified position as an apprentice. To the same effect is *Lipscomb v. Tennessee Coal, Iron & R. Co., 189 F. 2d 708 (C. A. 5)*. In *Addison v. Tennessee Coal, Iron & R. Co., 204 F. 2d 340 (C. A. 5)*; it was held (page 342) "Where an employee has no fixed or absolute right to promotion, and where his right to promotion depends upon qualifications over and above mere length of service" upon return from service he is entitled to restoration to the job he left, with accumulated seniority, but "is not entitled to promotions received by his successor during his absence * * *." The *Addison* case fully supports the judgment in the instant case. The case *Special Service Co., Inc. v. Delaney, 172 F. 2d 16 (C. A. 5)*, is similar on the factual situation to the *Addison* case, and is authority for our position. The case *Altgens v. The Associated Press, 188 F. 2d 727 (C. A. 5)*, turned on a construction of provisions of the collective agreement relating to right of promotion based on seniority alone or actual experience in the particular craft. Since seniority alone did not control as to the right of Altgens to the promotion he sought, his claim was rejected. In the case *Gregory v. Louisville & Nashville R. Co., 191 F. 2d 856*, a memorandum decision affirming *92 F. Supp. 770*, it was held the collective agreement did not provide for promotion on the basis of seniority alone, and relief claimed was denied. In the case *Seattle Star v. Randolph, 168 F. 2d 274 (C. A. 9)*, the question was whether time in military service was included in determining the proper amount of severance pay, and in denying the claim of the employee the Circuit Court upheld a provision of the collec-

tive agreement providing that time spent on furlough or leave of absence was not to be included in calculating severance pay, but only time spent on the job was to be included. The result was to treat the veteran Randolph exactly like non-veterans, which is consistent with the basic purpose of the Act, to prevent discrimination against the veteran, but at the same time not to confer on the veteran what has been referred to as "super seniority" or rights beyond those which would automatically flow to the veteran if his service had not been interrupted by military service. Petitioner cites these cases in note 11 at page 20 of the brief, with the suggestion these decisions, all prior to and irreconcilable with the *Diehl* case, are of doubtful present value. We believe each of these cases either supports our position, or can easily be distinguished on the factual situation, and are in no wise modified or overruled by the *Diehl* or later cases.

The complaint alleges, in effect, the conclusion that had petitioner remained continuously employed he would have obtained Group 1 status on September 8 or 10, 1952, but the collective agreement is attached to and made a part of the complaint, and petitioner's conclusion must be tested in the light of applicable provisions of the agreement. Obviously the District Court did so, and held, in effect, the conclusion reached by the petitioner was not supported by the agreement, and in affirming the judgment the Circuit Court of Appeals expressly so held. Group 1 status had not been obtained prior to military service, so petitioner had no seniority in Group 1 when he returned from military service. It seems clear that Group 1 status could be acquired,

if at all, only under the provisions of Rule 1(3)(A) (R. 6); or Rule 15 (R. 7); or Rule 10 (R. 7). We believe an analysis of each of these rules will disclose the correctness of the opinion of the Circuit Court of Appeals in holding *(240 F. 2d 8, 11)*:

> "* * * Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. * * *."

Rule 1(3)(A). (R. 6), cannot be construed to give McKinney a right to be assigned a Group 1 status, at any time, unless the employer desires to do so. Under this rule his *seniority* is restricted to the Group in which he was employed—i.e. Group 2—with a preference over non-employees, based on fitness and ability. Seniority is not a factor, and the employer may or may not see fit to assign a Group 2 employee to a Group 1 vacancy, or may assign the Group 2 employee with greatest or least seniority. We believe the authorities cited in this brief, construing similar provisions in other collective agreements, do not support petitioner's theory that Rule 1(3)(A) confers any contractual right to promotion or assignment to higher classification such as could be enforced by the Act.

Rule 15 (R. 7) does confer definite and ascertainable contractual rights in the form of two options, only one of which could have been exercised by petitioner. Under this rule it is admitted that one returning from military service may either (a) return to his former position, or (b) exercise *seniority rights* to any position bulletined during his

absence. McKinney asserts no violation of his rights under option (a). The positions bulletined were in Group 1, where McKinney then had no seniority which he could exercise under option (b). It is significant to note that one holding a mere *preference over non-employees* is not mentioned under option (b), but a returning employee exercising this option is limited to one having *seniority rights*. We believe Rule 15 does not confer on McKinney any rights to a Group 1 status that could be enforced by the Act.

The other rule relied upon by petitioner is Rule 10 (R. 7), which provides that vacancies will be bulletined in places accessible to all employees *affected* for 5 days in the seniority district where the vacancies occur. The *preference over non-employees* provision of Rule 1(3)(A) may make McKinney an *affected* employee such as would enable him to request assignment to the Group 1 vacancy, but there is nothing in Rule 10 which modifies or limits Rule 1(3)(A) in so far as employer discretion is concerned. The obvious purpose of Rule 10 is to provide a procedure to exercise rights, rather than to confer rights.

We respectfully submit that none of the rules relied upon by petitioner could be construed to confer the rights claimed, and that the record does not support the conclusions of the complaint.

At numerous places in his brief petitioner contends that he *might have been*, or *probably would have been*, assigned the Group 1 vacancy had he remained in continuous employment. We believe those matters are wholly immaterial,

for it clearly appears from all the reported cases that the Act was designed to protect rights rather than probabilities. If these claimed probabilities have any substance at all, their basis would have to be in custom rather than under contractual rights, and custom has been held insufficient to justify relief under the Act. *Raulins v. Memphis Union Station Co.*, supra, *Bond v. Tennessee Coal, Iron & R. Co.*, supra.

Petitioner contends the District Court should not have dismissed, but rather should have permitted a trial on the merits. If a trial be held petitioner would offer proof that he could meet the "fitness and ability" test of Rule 1(3)(A), but the authorities hold that decision is for determination by the employer. He might also offer evidence that custom decreed his advancement, but there again the reported cases hold that is not enough. Any evidence offered at a trial would be weighed in the light of controlling provisions of the collective agreement, and we submit the District Court could not have reached a different determination if petitioner offered proof on each point he mentioned in the brief.

> Whether an employer, because of mistake of law, who gives an employee returning from military service greater benefits as to job preference than is contemplated by Section 9 of the Universal Military Training and Service Act of 1951 and by the collective agreement, is thereby foreclosed from adopting a subquent authoritative interpretation of the Act and the agreement.

Petitioner makes much of the fact he was assigned a Group 1 position upon return from military service, and was permitted to displace McCuan, a person placed in that position fifteen days previously. By some process of reasoning, petitioner concludes he thereby "qualified" for, or was promoted to, the higher classified position bulletined during his absence. It is abundantly clear that McKinney had no right under the collective agreement to displace McCuan, and it is equally clear that action resulted from a mistake of law, a mistake as to the contractual rights of both McCuan and McKinney. The rights of McCuan are not involved here, but only those of McKinney. Having given McKinney a job preference to which he was not entitled, can it be said that Section 9 of the Act may be invoked to perpetuate the job status erroneously assigned by the employer? Could Congress have intended that result? We do not believe either question can be answered in the affirmative. We know of only one reported case on the precise point. In *Freeman v. General Motors Corp., 86 F. Supp. 527*, the District Court for the Eastern District of Michigan held that where an employee, because of mistake of law, gave veterans greater benefits as to job preference than those provided by the collective agreement and contemplated by the Act, the employer was not foreclosed from adopting a subsequent authoritative interpretation of the agreement and the Act. We submit the *Freeman* case is based on sound reasoning, and should be approved by this Court.

If, as contended by petitioner, his "fitness and ability" was determined on October 1, 1952, when he requested re-employment, or on October 2, 1952, when he was assigned the Group 1 position of "assistant cashier," or on October 7, 1952, when he first performed compensated services as assistant cashier (Rule 4; R. 6), it does not follow that his fitness and ability to perform any other Group 1 position was thereby determined. That would still remain a decision for management. He may or may not have been considered fit and able to handle the duties of "bill clerk" (the position then and now occupied by Fabian) or any one of a number of other positions in Group 1. The most that can be said, or established at a trial on the merits, is that if petitioner had remained continuously in respondent's employment he may or may not have been assigned to the Group 1 position of bill clerk he now seeks.

CONCLUSION

We submit that petitioner misconceives his rights under the collective agreement; that he would have had no fixed or absolute right to be assigned a Group 1 position had he remained in continuous employment, and his military service and honorable discharge therefrom cannot be held to enlarge those rights; and giving to petitioner upon his return from military service greater benefits as to job preference than he was lawfully entitled, does not prohibit respondent from adopting a subsequent authoritative interpretation of the collective agreement and the Act.

The opinion and judgment of the Circuit Court of Appeals is in full accord with decisions of this Court, and correctly construes the Act of Congress; fully protects the rights of petitioner under the "escalator principle"; and affords to petitioner every right to which he is entitled under the collective agreement.

WHEREFORE, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of the foregoing brief upon each of the following persons, viz: J. Lee Rankin, Solicitor General, Washington 25, D. C., and Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, by mailing a copy to each of them by first-class mail, properly addressed to each of them, with postage prepaid.

Dated September 27th, 1957.

M. E. CLINTON
Of Counsel for Respondent,
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Railroad Company

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 93.

HENRY T. McKINNEY,
Petitioner,
v.
THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF

For the Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 93.

HENRY T. McKINNEY,
Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF

For the Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

QUESTIONS PRESENTED.

a) Does the collectively bargained agreement here involved create a right to position and seniority in Petitioner, cognizable under the Universal Military Training and Service Act of 1951 when the contract gives Petitioner no fixed or ascertainable right thereto?

b) Does the Universal Military Training and Service Act of 1951 require the employment of a veteran in a position which he might or "probably" would have achieved but to which he had no contractually or otherwise established right?

c) Should the Complaint have been dismissed because the Petitioner, asserting purported position and seniority rights under the collectively bargained agreement, failed to allege that he followed or exhausted the grievance procedures prescribed by said agreement?

d) Did Petitioner waive his rights, if any, under the Universal Military Training and Service Act by his apparent acquiescence in his employer's action and by his failure for a period of some three years to invoke contractual grievance procedures or to file suit?

e) Did the District Court below lack jurisdiction over the parties and the subject matter herein because the Railway Labor Act vests exclusive jurisdiction in the premises in the National Railroad Adjustment Board?

STATEMENT.

Petitioner's complaint, lodged in the District Court below, sought the enforcement of alleged re-employment rights against the carrier-Respondent under Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5 (R. 2-10). The Brotherhood Respondent was, upon proper petition, permitted to intervene and upon motions by both Carrier and Brotherhood, the District Court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 15-16). The United States Court of Appeals for the Tenth Circuit affirmed on appeal in McKinney v. Missouri-Kansas-Texas R. R. Co., 240 F. 2d 8 (R. 17-22).

The complaint (R. 2-5, 9-10) alleged that the Carrier and Brotherhood Respondents have extant between them a collectively bargained agreement, in effect since August 1, 1925, concerning all classes of clerical employees including Petitioner. By Rule 1 (R. 5) clerical employees are classified as Groups 1, 2 and 3 and prior to his military service Petitioner was in Group 2. Rule 1 (a) (R. 6) provided as follows:

> (A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).

Rule 1 (c) (R. 6) provided that "seniority of employes will be restricted to the respective group in which employed * * *." Rule 4 (R. 6) provided that "Seniority begins at the time the employe's pay starts in the respective branch or class of service * * *." Rules 27-29 (R. 8-9) spell out a series of procedural steps for the protection of employes who deem themselves unjustly discharged and Rule 31 (R. 10) makes that grievance procedure available to an employe who considers himself otherwise unjustly treated" * * *. Rules 27-33 augment the grievance procedures with additional rights of appeal.

The petition alleges that complainant, then a Group 2 employee, on September 26, 1950, entered the Armed Forces for training and service and so continued until September 25, 1952, when he satisfactorily completed such period as allegedly evidenced by certificate.

The complaint further alleges that during Petitioner's military service on September 15, 1952, a Group 1 position

(bill clerk) was assigned to one Fabian, a non-employee, and that on September 22, 1952, another Group 1 position (assistant cashier) was assigned to one McGuan, also a non-employee. On October 1 Petitioner made application for reemployment and on October 7, 1952, was assigned to the above described assistant cashier position and given a seniority date of October 7, 1952, which he alleges he "duly protested" asserting that his seniority date should be September 8, 1952, or September 10, 1952.

Petitioner served as assistant cashier until September 9, 1953, when said position was abolished. Petitioner alleges that he sought to exercise his alleged seniority and place himself in the above described position of Bill Clerk but, that same was denied him and he was assigned to a less desirable position in which he subsequently served until the filing of the complaint on June 3, 1955.

Relief sought by Petitioner is that his seniority be fixed as of September 8, 1952, or September 10, 1952, and that he recover alleged lost wages.

SUMMARY OF ARGUMENT.

The dismissal of the complaint should be upheld.

Petitioner stated no legally recognizable claim under the Universal Military Training and Service Act of 1951. The collectively bargained agreement upon which he predicates his claim does not accord him an ascertainable or fixed right to the position and seniority which he claims. Its provision as to advancement to Group 1 by Group 2 clerks is purely precatory and places such advancement in the sole discretion of the employer based upon fitness, ability and other considerations. Petitioner erroneously seeks that the District Court determine that he have a position which he **might** or **probably** would have received and assay his fitness and ability for a promotion for which he had no right but which lay entirely within the discretion of the employer. The fact that the employer elected to place Petitioner in one Group 1 position (Assistant Cashier) in no way bears upon his entitlement to another (Bill Clerk). Petitioner by this action seeks drastically to enlarge the scope of the Universal Military Training and Service Act of 1951, far beyond its stated language and meaning as judicially construed.

The complaint and contract exhibit attached thereto prescribe certain grievance procedural steps which must be adhered to with respect to the rights of employees thereunder. Failure of Petitioner to follow those procedural requisites compels dismissal of the complaint.

In addition, the complaint reflects on its face that Petitioner waived his rights, if any, under the Universal Military and Training Act of 1951 by his apparent acquiescence for a period of years in the carrier's action and his failure until 1955 to file suit herein.

Finally, the District Court lacked jurisdiction herein because exclusive jurisdiction over the parties and subject matter is vested by the Railway Labor Act in the National Railroad Adjustment Board to the exclusion of the Courts. The Universal Military Training and Service Act of 1951 did not expressly or impliedly repeal or obliterate the Railway Labor Act or destroy its impact because one of the parties involved is a veteran.

The complaint was properly dismissed below.

ARGUMENT.

I.

Relief Must Be Denied Plaintiff Because He Had No Right Under the Universal Military Training and Service Act of 1951 to the Position, Seniority and Pay Claimed.

a) **Under the Applicable Agreement Plaintiff Has No Right or Entitlement to the Position and Seniority Status Claimed.**

Petitioner endeavors to catapult himself into prevailing in this case by a process of distorting and enlarging upon the meaning and impact of the Universal Military Training and Service Act of 1951 (65 Stat. 75), 50 U. S. C., App. 451, and the applicable collectively bargained agreement. By a tenuous, if resourceful, process of ascribing to both act and contract language and meaning, which are simply non-existent, he emerges with his theory for recovery.

First, as to the law, Petitioner asserts that under the Universal Military Training and Service Act of 1951 the returning veteran is entitled to judicial promotion to a position which he **probably** would have achieved had he not gone into military service even though he has no contractual or fixed right to same. If the desired position is one which could have been attained only on the basis of selection from Group 2 and his fitness and ability, Petitioner would have the District Court assay his fitness and ability and then conjecture as to whether the employer would or might have promoted him to positions for which he was eligible or available, even though he had no right or entitlement to them.

The plain language of the Act coupled with judicial construction thereof permit no such fanciful or unrealistic

result. Simply and clearly, under the act the returning veteran is entitled "to a position which on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which, he would have held if he had remained continuously in his civilian employment." He is entitled not to lose ground, be penalized or to suffer in his seniority status because of military service. The Act's benefits extend however only to such re-employment on the seniority escalator as exist as a matter of ascertainable right and not to such conjectural or speculative promotions as he might or might not achieve based upon his being considered fit and able to fill a job which chanced to open. We fully subscribe to the "escalator principle" as spelled out in **Fishgold v. Sullivan Drydock & Repair Corp.**, 328 U. S. 275, and **Trailmobile Co. v. Whirls**, 331 U. S. 40. Those cases, however, do not uphold Petitioner's contentions. Indeed, both admonish against the super-seniority claimed by petitioner here.

The contract here does not create a right which when fitted into the fabric of the Universal Military and Training Act of 1951 would entitle Petitioner to the position and seniority claimed.

Rule 1, upon which Petitioner must rely, divides clerks into several groups and explicitly provides that seniority and promotions are confined to an intra-group basis save that Group 2 employees, based on fitness and ability, will be given preference over non-employees in the assignment to Group 1 positions. This fixes no rights to promotion to Group 1 and is merely precatory in nature. It could not be otherwise because the preference extended is to any and all Group 2 clerks for any and all Group 1 positions. No definite or ascertainable mode of making such promotions is in any wise indicated nor is there any basis created for selecting any particular Group 2 employee. Rule

four (4) establishes that an employee's seniority in any branch or class commences when pay starts and under Rule five (5) the exclusive determination of fitness and ability is vested in the appointing officer. Hence, the contract pleaded and relied upon by Petitioner gives him no absolute, fixed or certain right, predicated upon seniority alone, to promotion to Group one (1), but rather extends to him only a limited preference to Group one (1) promotion, carefully restricted to a fitness and ability basis. The conjectural possibility that plaintiff might have been promoted to Group one (1) had he not been in the military service, is not enough to entitle him to relief under the Act relied upon.

Petitioner in attempting to delineate his rights under the contract overstates and inflates its provisions, all beneficially, of course, to Petitioner. Repeatedly, Petitioner's brief refers to his having been "in line for promotion" to Group I on September 8 and 10, 1952, and his purportedly having become "eligible" for such promotion on those days. Plunging on, the brief then concludes that he probably would have been promoted, that he seemed to have the necessary fitness and ability and, hence, a cause of action is stated here. This is sheer nonsense! Petitioner was no more "in line for promotion" or "eligible" for same on September 8 and 10 than he and every other Group 2 employee would be every day. Any Group 2 employee, regardless of seniority therein, might under the contract receive preference. The precatory language is so broad, however, that it is clear that no rights whatever are created in Petitioner or any other Group 2 clerks, all of whom are referred to generally in the section of Rule 1 involved.

An interesting aspect of Petitioner's brief is the section at pages 20-21 where much is made of the fact that the carrier, exercising its broad discretion, did place Petitioner in the Group I Assistant Cashier position. Such was the

contractual prerogative of the carrier for which the carrier need offer no explanation. Petitioner seemingly asserts that somehow this action proves or reflects that the carrier should also have placed petitioner in the Bill Clerk position. Such boot strap climbing is wholly unwarranted by the contract. The simple fact is that the carrier could have placed **any** Group 2 employee or any non-employee in either Group 1 position without any violation of Petitioner's rights.

Further, the Petitioner admitting that he has no right to the position and seniority claimed seems to envision that the District Court should endeavor, by retracing what might have happened had Petitioner not gone into the service, to appraise Petitioner's fitness and ability and the possibility that the carrier might in its discretion have put him in the Group 1 position. This is a type of proceeding far beyond the scope of the Universal Military Training and Service Act of 1951 and points up the correctness of the dismissal of the complaint.

Under the circumstances here presented, it is clear that plaintiff under U. M. T. had no seniority right to the position and status claimed and accordingly, the complaint must be dismissed. The authoritative cases uphold this contention.

A veteran who, at the time he entered service, was designated as "traffic manager" was held in **Meehan v. National Supply Company**, 160 F. 2d 346 (C. A. 10, 1947), not to be entitled, upon his return to service, to a position designated as "general traffic manager," created during the veteran's training period. The Court held that the purpose of the Act was to preserve to those who entered the military service full benefits of the position which they occupied at the time of entering the service, but stated that such did not justify a strained construction of facts in order to give a returning veteran a higher position than

the one he occupied at the time he entered service or a new position created after he was in the service.

In **Oil Workers, etc., v. Sinclair Refining Company**, 171 F. 2d 192 (C. A. 5, 1948), the Court said (l. c. 194):

> "We agree with the arbitrators that it would take a strained construction of the law and the contract to entitle the returned veteran to exercise his option on a job one step removed from the one on which he was denied the opportunity to exercise his option by reason of his absence for military service."

Governing here is **Raulins v. Memphis Union Station Company**, 168 F. 2d 466 (1948, C. A. 6), wherein it was held that veterans who had been, prior to service, electrician's helpers were not entitled to re-employment as electricians, merely on the basis that the time spent by them in the service should be used in computing seniority for a promotion from electrician's helper to electrician since the seniority provided by the collectively bargained agreement applied only within a single job classification and did not apply with respect to promotion from one grouping to another.

Polansky v. Elastic Stop Nut Corporation, 78 F. Supp. 74 (D. C., N. J., 1948), held that where differences in classification were based on the particular skill and ability of the employe and not solely upon length of service, the Court could not assume or speculate that the returning veteran would have been promoted had he not been in military service.

The rule here contended for was well stated in **Harvey v. Braniff, etc.**, 164 F. 2d 521 (C. A. 5, 1947), wherein the Court said (l. c. 522):

> "Where an employee has no fixed or absolute right to promotion and where his right to promotion de-

pends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the Selective Training and Service Act when he restores the veteran to the same position or one of like seniority and pay which he held at the time of his induction into the service."

In **Hewitt v. System Federation**, 161 F. 2d 545 (C. A. 5, 1947), the classifications of carman helpers and car cleaners (a lower grouping) were by agreement separate and there was no interlocking seniority although the railroad-employer usually offered car cleaners the opportunity to qualify as carman helpers as vacancies occurred. During plaintiff's military service a number of car cleaners, including one junior to plaintiff, were promoted to carmen helpers. In instructing the District Court to dismiss the complaint, the Seventh Circuit said (l. c. 546):

"We agree with appellants that as a general proposition the attachment of rights to the seniority of employees is accomplished only by contract, that is to say, the sole source from which seniority rights have accrued is through some form of private contract. Ryan v. New York Cent. R., 267 Mich. 202, 255 N. W. 365; Polanskey v. Monongahela R., 342 Pa. 188, 19 A. 2d 377. In the Act here involved, Congress recognized the existence of seniority systems and seniority rights within the framework of the existing system and undertook to give the veteran protection, plus a guarantee against demotion. Fishgold v. Sullivan Drydock & Repair Corporation, supra, 328 U. S. 288, 66 S. Ct. 1112. In our case the car cleaners and the carman helpers, by their collective bargaining agreement, had separate seniority rights among themselves, without a provision whereby an employe classified as a car cleaner might transfer and be classified as a carman helper on the basis of seniority rights. In this state of the record, the trial court, having found as a fact

that "At the time of petitioner's (appellee's) induction into the Armed Forces there was a contract of seniority within the classification of car cleaners as well as a contract of seniority within the classification of carmen helpers, but at no time has there been a contract of seniority governing promotion from the classification of car cleaner to the classification of carmen helpers' and 'That petitioner (appellee), at the time of his induction into the Armed Forces, had no right to promotion from the classification of car cleaners to the classification of carman helpers by virtue of any custom or any written contract' was in error in directing the railroad to place appellee's name on its seniority list before the names of the eight individual appellants and assigning to appellee the seniority date of April 18, 1943."

In **Bond v. Tennessee Coal, Iron & R. Co.**, 73 F. Supp. 333 (D. C. Ala., 1947), a pre-military service assistant payroll clerk sought the rating of payroll clerk upon discharge. He was denied relief because, the Court held, seniority as to time would be pertinent to his promotion only if "ability" and "physical fitness" were equal. In denying relief the Court made the following finding of fact:

"5. Petitioner, at the time when he left the position of Assistant Payroll Clerk for the purpose of entering the armed forces, had no fixed, or absolute, right to promotion to the position of Payroll Clerk, by virtue of any contract, written or otherwise, or by virtue of any custom or practice. At no time material hereto, did the right to promotion from the position of Assistant Payroll Clerk to that of Payroll Clerk depend solely on the length of continuous service in the position of Assistant Payroll Clerk. While the Assistant Payroll Clerk, oldest in point of service in such position usually was given preference in filling a vacancy

as Payroll Clerk such fact did not ipso facto, entitle him to be promoted, as other factors were given consideration."

The cases belabored by Petitioner do not support his fanciful theories and can be briefly disposed of.

Oakley v. Louisville & N. R. Co., 338 U. S. 278, 94 L. Ed. 87 (1949), contributes nothing to appellant's contention here. It only holds that the expiration of the one-year statutory period did not terminate the veterans' re-employment or other rights under the act. The Court there stated that his seniority status continues beyond that year "subject to the advantages and limitations applicable to the other employees."

Furthermore, **Diehl v. Lehigh Valley Railroad Co.**, 348 U. S. 960, 99 L. Ed. 749 (1955), was a memorandum opinion reversing the court below on the basis of the **Oakley** opinion and is "dispositive" of nothing—particularly so far as the case at bar is concerned. The facts there bore no resemblance to those at bar and, inasmuch as there was no opinion of the Supreme Court, no meaningful illumination is furnished here. At the most, one could glean from the memorandum opinion that a union contract executed after a veteran's return from service could not, by requiring certain periods of temporary service as a qualification for promotion, defeat the veteran's rights under the Selective Service Act.

Morris v. Chesapeake & Ohio Railway Company, 171 F. 2d 579 (C. A. 7, 1949), involved no issues touching upon those at bar. The holding of that case was merely that the qualified veteran was excused from "bidding in," during the service period, a job to which his seniority clearly entitled him, and that he could do so upon his return from service. Essentially the same situation prevailed in **Conner v. Pennsylvania Railroad Company**, 177 F. 2d 854 (C. A. D. C., 1949). Both cases involved fixed and ascertainable

rights and bear no relevance to the issues in the instant case.

It is clear that the returning veteran by virtue of the Act is not entitled to superseniority or any seniority or rights greater than those conferred by a collectively bargained agreement. **Fishgold v. Sullivan Drydock and Repair Corporation**, 328 U. S. 275, 11 Labor Cases No. 51,232. It is further established that such agreement, entered into prior to the veteran's entry into service and not discriminatory as to veterans, will fix such matters as status, seniority, promotions and other benefits. 2 C. C. H. Lab. Law Rep., page 7056.

In essence the above demonstrates that Petitioner is here asserting a purported right which is not predicated upon the contract involved and which goes far beyond the protection accorded by the Universal Military Training and Service Act of 1951. Petitioner concedes, in effect, that this case is an effort to extend that law to placing returned veterans into positions, to which they have no right, but which they might have attained had the employer in its discretion determined so to promote them. Such a principle is without basis in law and would annihilate the salutary objectives of the act.

b) **Plaintiff has not complied with the grievance and other procedural steps spelled out in and required by the collectively bargained agreement involved and upon which he relies.**

The contract involved provides a further insuperable barrier to relief here. Plaintiff freely concedes that his right to the seniority claimed is predicated solely upon the collectively bargained agreement. He seeks to pick and choose certain clauses (dealing with promotion) and to rely tenaciously on them. He utterly disregards other provisions of that agreement and seeks judicial determination without reference to them. It was not the stated

word or implied intention of the U. M. T. that the grievance procedures of collectively bargained agreements be annihilated and the Courts required to substitute for them.

Inextricably interwoven with this argument is the fact that the Clerk's Agreement provided in Rule 27, Rule 31, et seq. for elaborate and speedy intra-company hearings and appeals for the employee with a grievance, including those revolving about promotion and seniority. No allegation is made in the complaint that these were invoked or pursued. Until they are pursued and defendant has acted thereunder, it could not be said that defendant denied seniority or other rights to plaintiff. In **T. W. A. v. Koppal**, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906 (1953), it was held that where an employee, treating himself as unlawfully discharged (and, therefore, not required to go to N. R. A. B.) lodges a common law action for unlawful discharge he must show an exhaustion of his administrative or grievance remedies under the contract of employment, if the applicable state law requires.

Plaintiff here failed to exhaust his administrative and grievance remedies. He therefore has no right to proceed in this action. Rule 27, Rule 31, et seq. of the contract are so clear that the Courts of Oklahoma would unmistakably require plaintiff to exhaust his contractual administrative grievance remedies before being permitted to maintain this action. We submit that the following quotation from 31 American Jurisprudence 881, Labor, Sec. 123, is applicable:

> "In general, where a collective agreement provides for an extra judicial means of hearing and determining disputes growing out of grievances of employees or the interpretation and application of contracts between employer and employees, an employee should exhaust the remedy provided before resorting to the courts."

Our position here is buttressed by **Polansky v. Elastic Stop Nut Corporation**, 15 Labor Cases No. 64563, 78 F. Supp. 74 (1948, D. C. N. J.), wherein it was held that the veteran relying for seniority status under the Universal Military Training and Service Act or its predecessors on a labor agreement must show himself to be in compliance with it, including the timely and proper resort to grievance procedures.

Further support for our position is found in **Wood v. Glen Alden Coal Company**, 73 F. Supp. 871 (D. C. Pa., 1947); **Mraz v. Presto Lock Company**, 16 Labor Cases No. 64013 (D. C. N. J., 1947); **Van Vloten v. News Syndicate Company**, 17 Labor Cases No. 65520 (D. C. N. Y., 1950), and **Willoughby v. A. T. & S. F. Railway Company**, 14 Labor Cases No. 64464 (D. C. Kan., 1948).

It must be borne in mind that the grievance procedures here described are, under the Railway Labor Act, closely interlocked with National Railroad Adjustment Board procedures which constitute the next step and which are actually a continuation of the collective bargaining process.

Clearly, the rights of plaintiff here asserted are founded entirely on the collectively bargained agreement. He was reemployed in a job better than the one he had upon entry into service. If he had additional seniority rights they could only flow from the agreement, which is not a piecemeal assortment of separate rights but rather an integrated contract with seniority provisions interwoven with others, including such subjects as grievance procedure. To rely upon the agreement, plaintiff must fulfill his duties under it including the timely invocation of its carefully spelled out grievance procedure. Plaintiff's complaint establishes that he failed in that obligation and accordingly dismissal is required.

The Universal Military Training and Service Act does not destroy contracts and throw all parties into expen-

sive time taking litigation when simple and binding contractual grievance procedures are not only available but required before relief may be sought in the Courts.

c) **Plaintiff's failure to file this suit at or near the time that his seniority date in Group I was set and his failure timely to pursue the grievance procedure under the collectively bargained agreement constitute waiver and require the dismissal of the complaint.**

Plaintiff alleges that his seniority date in Group I was assigned in October, 1952, as being "October 7, 1952," and that he "Protested" same. He alleges no other steps to assert his rights and therefore may be presumed to have taken none to procure a different seniority date until this suit was filed. Clearly, he went to work on the assigned basis, filed no suit, failed to invoke the grievance procedures of the agreement and patently led both Respondents to believe that he acquiesced and concurred in his assignment and seniority date. Thus misled, the carrier paid Fabian in his position, replaced McCuan by plaintiff and all with plaintiff's apparent consent. In September, 1953, plaintiff was placed in Group 2 because of the abolishing of the assistant cashier position. Plaintiff alleges that he "requested" the Bill Clerk's post but upon his requests being denied he commenced working in a Group 2 position and took no further action of any nature or description until June 3, 1955, almost two years later when this suit was filed. In good conscience, the Courts could not permit recovery now.

All of plaintiff's rights admittedly flow from the collectively bargained agreement here involved. Yet he utterly failed to comply with that agreement in that he did not lodge his request for hearing under Rule 31 and pursue other procedural steps carefully spelled out in Rules 27-33. Whatever rights plaintiff had under Rule 1 could be asserted only as provided for in other rules. By his non-com-

pliance with the grievance procedure rules, plaintiff has waived and eradicated any right of recovery which he might have had.

The rights of a veteran under the Universal Military Training and Service Act may be waived if same is done in a clear and unequivocal manner. In **Hastings v. Reynolds Metals Co.**, 165 F. 2d 483 (C. A. 7, 1947), a returned veteran, while on terminal leave, entered into a written contract with his prior employer, terminable at will. When the employer did terminate the written contract, the veteran then endeavored to rely on his veteran's right. He was held to have waived same. So, in **Walsh v. Chicago Bridge and Iron Co.**, 90 F. Supp. 322 (D. C. Ill., 1950), a returned veteran was first re-employed in his employer's shipbuilding division but subsequently accepted employment in the unrelated "permanent business organization" where he worked for some three years and was then discharged. At that juncture he attempted to assert his veteran's rights but the Court held same to have been extinguished because of his waiver.

And thus, here, the veteran after brief re-employment in Group II accepted a job in Group I but **not** the job to which he would have been entitled under his tenuous seniority theory. Although he alleges generally that he "protested" he does not allege that he pursued the contract's grievance procedure with its time limitations and he waited for more than a year to file suit. Unqualifiedly, whatever rights he had under the contract and the Universal Military Training and Service Act were waived and extinguished.

That act is not intended to be an avenue of entrapment of the employer or the source of his being misled, over a long period of time, into duplicate pay to a veteran and non-veteran because the veteran ostensibly acquiesced for several years in his assigned re-employment, and then, abruptly changing course, filed suit. In October, 1952, at

the time of his re-employment, plaintiff had all the information he ever could acquire about his seniority date and rights. His failure to invoke the contractual grievance procedures and his delay of several years to file suit—all the time apparently acquiescing in his job—constitute, as reflected by the face of the complaint, a waiver which bars any recovery on his part.

II.

The District Court Lacked Jurisdiction Over This Action Because Exclusive Jurisdiction Over the Parties and the Subject Matter Thereof Is Vested in the National Railroad Adjustment Board by the Railway Labor Act, No Part of Which Was Repealed by the Universal Military Training and Service Act.

Although the District Judge in his Order Sustaining the Motion to Dismiss specified that the order was predicated upon "the reason that the complaint fails to state a claim for which relief can be granted against the defendant, this Court will uphold the action of the District Judge if this Court finds that the complaint should have been dismissed for that reason or for other asserted reasons. **Dowd v. United Mine Workers of America**, 235 F. 1 (C. A. 8, 1916).

We submit that the District Court lacked jurisdiction over this action because exclusive jurisdiction over the parties and the subject matter is vested in the National Railroad Adjustment Board by the Railway Labor Act (C. 681, 48 Stat. 1185), 45 U. S. C., Ch. 8, Secs. 151-188, no part of which was repealed by the Universal Military Training and Service Act.

If the District Court had heard this cause on the merits, the grievance concerning seniority would have been determined and the Court would have been compelled to interpret the collectively bargained agreement between the

Respondents. Such interpretation would include the issue as to whether or not plaintiff has a seniority right of promotion from Group two (2) to Group one (1), whether plaintiff has a meritorious grievance and related issues turning on Rules 1, 4, 6, 15, 27, 28, 29, 30, 31, etc., of the Agreement.

Under the Railway Labor Act exclusive jurisdiction to determine the issues herein, interpret the Agreement and adjudicate plaintiff's grievance is vested in the National Railroad Adjustment Board.

An adequate consideration of this question must commence with a brief review of the history, nature and objectives of the Railway Labor Act.

The Railway Labor Act represents the culmination of some sixty years of thoughtful effort on the part of the federal government, railroad labor and the carriers to create machinery through which harmonious labor relations might be achieved and maintained. This objective is a particularly vital one because of the immeasurable importance to the public of stable and uninterrupted rail road service. Railroad labor relations prior to the Railway Labor Act had in many respects been turbulent and chaotic principally because of the inadequacy of the machinery provided therefor.

The objectives of the Railway Labor Act are stated therein as being the avoidance of interruption of commerce or the operation of carriers engaged therein, the establishment of harmonious relations between carriers and their employees, and the affording of machinery for the prompt and orderly settlement of disputes growing out of grievances or the application of collectively bargained agreements.

The National Railroad Adjustment Board was created to determine and adjudicate grievances and disputes con-

cerning the interpretation of agreements. This Board is constituted of eighteen (18) members paid, selected by and representing the national railroad labor organizations, and eighteen (18) members paid, selected by and representing the carriers. The Board is divided into four divisions, based on the crafts or classes of employees. All of the issues here involved are within the jurisdiction of the Third Division. The Act further provides that if disputes falling within the province of the N. R. A. B. fail of adjustment in the usual manner by the parties, either or both may refer the dispute to the N. R. A. B. Simplified pleadings and formal hearings are provided for. Should the members of a division deadlock, a "referee" is selected who will sit with the board in its further deliberations and make an award. Awards of the board must be in writing and are "final and binding" on the parties "except insofar as they shall conta a money award."

A series of authoritative decisions of the Supreme Court and other appellate courts have firmly established that the mode of adjudicating grievances and interpreting railway labor agreements prescribed by the Railway Labor Act is exclusive and cannot be encroached upon by the courts and that it is, in effect, a continuation of the contract negotiating and administering process. **It has uniformly been held that the matters within the province of the Board's jurisdiction cannot be determined by the courts even though there is some jurisdictional base which, but for the Railway Labor Act, would warrant the assumption of jurisdiction by the courts.**

In **Slocum v. D. L. & W. R. R. Company**, 339 U. S. 239, 94 L. Ed. 795 (1950), a declaratory judgment suit had been filed by one union in order to determine whether certain work fell within the scope of its contract or that of another union. In denying the jurisdiction of the courts to make such determination, the Supreme Court said:

"The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for judgment of railroad employe disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications.

"Our ground for this holding was that the Court 'should not have interpreted the contracts . . .' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S., at 567, 568. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

A plethora of sound and binding decisions have recognized the unassailable proposition that the Federal Courts have absolutely no jurisdiction to interpret collectively bargained railway labor agreements. In **M.-K.-T. R. R. Company v. B. R. C.**, 188 F. 2d 302 (C. A. 7, 1951), the Court said (l. c. 305):

"There is no question now but that the courts have absolutely no jurisdiction to interpret agreements between carriers and their employes or to settle disputes arising out of the construction of such agreements. That principle has been so firmly established by a series of decisions construing § 3 of the Railway Labor Act that we deem it unnecessary even to cite authorities."

That the adjudication of grievances under and the interpretation of railway labor agreements is exclusively the affair of the National Railway Adjustment Board is judicially established beyond the pale of dispute. **O. R. C. v. Southern R. R. Company,** 339 U. S. 255, 94 L. Ed. 811 (1950); **O. R. C. v. Pitney,** 326 U. S. 561 (1945); **Washington Terminal Company v. Boswell,** 124 F. 2d 235 (C. A. D. C., 1941).

The all-important issue here is whether the Universal Military Training and Service Act somehow, in railroad employe cases, obliterates the careful and unique scheme of the Railway Labor Act. Most significant is the fact that no express or implied provision of the act would indicate such an intention on the part of Congress. Restoration of re-employment in a position of "like seniority, status and pay" is guaranteed and indeed was admittedly under the complaint granted here by defendant. Nothing in U. M. T., however, justifies or hints that the District Court may go on under 50 U. S. C. A., App., Sec. 459, and determine in Railway Labor cases that the employe has a justifiable grievance and then, interpreting the collectively bargained agreement, that plaintiff is entitled to a better job than the one he left because of seniority. That subject matter remains with N. R. A. B. and in such a case we urge that suits under U. M. T. would be applicable, if at all, only after N. R. A. B. and subsequent Railway Labor procedures had been invoked and the employer had ultimately refused to comply with the award.

That issue, here presented, has not heretofore been adjudicated—perhaps because other plaintiffs have not endeavored to supercede the Railway Labor Act with U. M. T. And over-all appraisal of the problem and tenor of U. M. T. decisions clearly establishes that matters exclusively within N. R. A. B. jurisdiction cannot be adjudicated by the Courts.

This would appear to be true because the Courts have tangentially indicated that where there is a well defined contractual or legal scheme for determining a seniority question, that will be a condition precedent of or perhaps a bar to action under U. M.-T. **Wood v. Glen Alden Coal Company,** 73 F. Supp. 871 (D. C. Pa., 1947); **Mraz v. Prests Lock Company,** 16 Labor Cases No. 64,013 (D. C. N. J., 1947); **Van Vloten v. News Syndicate Company,** 17 Labor Cases No. 655,520 (D. C. N. Y., 1950); **Willoughby v. A. T. & S. F. Railway Company,** 14 Labor Cases No. 64,464 (D. C. Kan., 1948).

That the Universal Military Training and Service Act was not intended to obliterate National Railroad Adjustment Board jurisdiction is further buttressed by the fact that in its proceedings the Board is statutorily obliged to give notice to parties "involved." Fabian, whose job and livelihood are ultimately at stake here, might well be held by that Board to be entitled to notice in order to avert a denial of due process of law to him. Certainly a piecemeal determination by the District Court below, ignoring Fabian, would inevitably lead to further multiplicity of administrative and Court proceedings.

Whether Fabian is a party "involved" in this dispute is a complex question which can be competently determined only by the Adjustment Board. Notice is not required in all cases (**Whitehouse v. Illinois Central Railroad Company,** 349 U. S. 365, 99 L. Ed. 1155 [1955]), but it may well be required (see **Nord v. Griffin,** 86 F. [2d] 481 [C. A. 7, 1936]; **Estes v. Union Terminal Co.,** 89 F. [2d] 768 [C. A. 5, 1937]; **B. R. T. v. Templeton,** 181 F. [2d] 528 [C. A. 8, 1950]; **Kirby v. P. R. R.,** 188 F. [2d] 793 [C. A. 3, 1950]; **M-K-T R. R. Co. v. B. R. C. et al.,** 188 F. [2d] 302 [C. A. 7, 1951]).

In commenting on the need for notice in this type of case, the following was said in **M-K-T R. R. Co. v. B. R. C. et al.,** 188 F. (2d) 302 (C. A. 7, 1951):

"We can think of no employee having a more vital interest in a dispute than the one whose job is sought by another employee or group of employees."

We believe that Congress by limiting essential parties in U. M. T. cases to employer and employee clearly reflected that it did not contemplate this type of action being adjudicated by District Courts.

Fabian has an interest here. Whether he is entitled to notice is a question resolvable only by N. R. A. B. The law does not contemplate the District Court having jurisdiction over this action.

The confusion and injustice which would result from the ousting of the National Railroad Adjustment Board of its jurisdiction is patent. Among the incongruous consequences are the following:

If the District Court took jurisdiction, Fabian (the employee to be displaced), shorn of the procedural rights granted him under the Railway Labor Act, would either have to stand idly by or else go to the expense and trouble of intervening herein. If the District Court upheld McKinney, Fabian would, under the contract and the Railway Labor Act, have the right to pursue his grievances through prescribed channels and to the National Railroad Adjustment Board, where notice of his claim might be given to McKinney under cases cited above. Were the Board to decide for Fabian and were such award, entitled as it is to prima facie weight, upheld in a statutory suit for enforcement, the carrier would find itself in the absurd dilemma of having two employees, entitled to the same job and to the same back pay—and both under a decree of a United States District Court. Patently Congress intended no such result.

Furthermore, the expertize of the N. R. A. B., which Congress so painstakingly provided for, would be lost.

The pattern of railway labor grievance handling, under contracts and under the Railway Labor Act, would be haphazardly interrupted and discarded whenever a veteran was involved. Seniority problems, often concerning a long list of employees, would be irrationally split and submitted to far-flung, unrelated tribunals. Because carriers may submit disputes to N. R. A. B., the same dispute might be simultaneously presented to a District Court and the N. R. A. B.—and perhaps with different results. Veteran and non-veteran employees might be put to an eternal race of diligence to lodge claims in the Courts or the N. R. A. B. and the carriers might often enter the fray asserting their rights.

The question presented here is one solely involving seniority and interpretation of a railroad labor agreement, the precise subjects which the National Railroad Adjustment Board is geared to handle. This case in no event involves discrimination against a veteran as such and the District Court could not make any determination other than the one which the Adjustment Board would make.

We urgently submit that the Universal Military Training and Service Act did not repeal the Railway Labor Act and that a common sense interpretation of the two would leave no doubt, but that the Railway Labor Act procedures if applicable must precede a veteran's invoking U. M. T. relief.

To sustain the appellant's position, this Court must hold that the Universal Military Training Act has repealed or superceded the Railway Labor Act. Pertinent is the fact that U. M. T. not only does not expressly in terms repeal or supercede the Railway Labor Act but indeed there is no language of any nature or description contained in the Universal Military Training and Service Act, 50 U. S. C., App. 459 (d), which reflects any Congressional intention to repeal or supplant the Railway

Labor Act. We must explore the issue as to whether that Act was repealed (as to returning veterans) by implication because of inconsistency or repugnancy to the Railway Labor Act.

It is fundamental that repeal of statutes by implication is not favored in law and will not be upheld unless the repugnance or inconsistency is so clear and plain as to be beyond the range of reconciliation. **Arthur v. Homer,** 96 U. S. 137, 24 L. Ed. 811 (1877).

It is patent that the Acts are not inconsistent at all, save for the plaintiff-veteran who seeks to distort and exploit his veteran's rights to bring him special privilege. It is clear and elementary that the Congressional intent was to assure veterans against discrimination following military service. In the particular area of plaintiff's work Congress had already conferred upon covered railroad workers the substantial benefits of the Railway Labor Act which non-railroad workers do not enjoy. Obviously, where a complaining employee who is both a veteran and a railroad worker is involved, he must first pursue his rights under the Railway Labor Act and there a full and quite advantageous remedy is available to him. If the employer fails then to accord him those rights the Universal Military and Training Act might give such an employee a further vehicle for self protection. The acts are not inconsistent, but rather cumulative.

An equally pertinent rule of statutory construction is that a general act does not repeal a special, specific or particular act unless same is done expressly. **Ex parte Kan-gi-shun-ca,** 109 U. S. 556, 27 L. Ed. 1030, 3 S. Ct. 396 (1883).

The Railway Labor Act is a special and particular act designed to assure stability in railroad and other transportation by spelling out extensive procedures and rights

as to labor relations. The Universal Military Training and Service Act is a general enactment conferring rights on all veterans in whatever industry or employment. It does not expressly repeal or mention the Railway Labor Act and indeed is not inconsistent with it. Patently U. M. T. does not repeal the Railway Labor Act, which must simply be read together with U. M. T. and construed as an exception thereto. See **U. S. ex rel. Gillett v. Dern**, 74 F. (2d) 485, 64 App. D. C. 81 (C. A., D. C., 1934); **U. S. ex rel. v. Burnet**, 65 F. (2d) 195, 62 App. D. C. 107 (C. A., D. C., 1933).

Actually, the Railway Labor Act, as to railway employees, provides a detailed, delicate, precise machinery, meticulously geared to the exact needs of the railroad industry to accomplish the objectives which are generally intended by the Universal Military Training and Service Act to cover all employments, lumped together. The plaintiff will receive equal—and more expert—justice from the Adjustment Board as he could from a District Court.

We urge that the National Railroad Adjustment Board has exclusive jurisdiction over the parties and the subject matter herein and that it is in no wise repealed or superceded by the Universal Military Training and Service Act. The underlying objectives of both enactments will be best achieved by reading them together.

Petitioner cannot lightly brush aside the lack of jurisdiction in the District Court for the reasons stated herein.

CONCLUSION.

For the reasons stated above it is respectfully urged that the judgment below should be affirmed. The rights asserted by petitioner are without basis under the Act or the collectively bargained agreement. Petitioner seeks to distort and extend the Universal Military Training and Service

Act to create for himself a posture wholly without legal foundation. Such result is further compelled because the District Court lacked jurisdiction over this action because of the impact of the Railway Labor Act.

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Certificate of Service.

I hereby certify that on this ..... day of October, 1957, I served three copies of the foregoing brief on J. Lee Ranken, Esq., Solicitor General; George Cochran Daub, Esq., Assistant Attorney General; Samuel D. Slade, Esq., and John G. Laughlin, Jr., Esq., Department of Justice, Washington (25), D. C., attorneys for petitioner; and three copies of the foregoing brief on Wayne R. Howell, Esq., M. E. Clinton, Esq., and Dan M. Welch, Esq., Barrett Building, Denison, Texas, attorneys for Respondent Missouri-Kansas-Texas Railroad Company, by mailing same, properly addressed, to each of them by first-class United States mail with postage prepaid.

.....

Carroll J. Donohue.

MOTION FILED OCT 9 1957

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 93.

HENRY T. McKINNEY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY et al.,
Respondent.

MOTION

To Remove the Above Entitled Cause from the Summary Calendar.

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IN THE

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HENRY T. McKINNEY,
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MISSOURI-KANSAS-TEXAS RAILROAD COMPANY et al.,
Respondent.

MOTION

To Remove the Above Entitled Cause from the Summary Calendar.

Comes now the Respondent herein, the Missouri-Kansas-Texas Railroad Company and further comes the Respondent, the Brotherhood of Railway Clerks, etc., and do hereby move the Court to remove the above-captioned cause from the summary calendar and to place same on the Court's calendar for hearing and that oral argument of one hour

on each side under Ru 44 (4) be permitted for the following reasons:

1. Your movants submit that this case, if heard by the Supreme Court, justifies extended argument at least to some extent as is accorded cases not on the summary docket.

2. The Respondent, Missouri-Kansas-Texas Railroad Company, and the Respondent, Brotherhood of Railway Clerks, etc., are on the same side and urge that the result reached below is correct, but said Respondents respectively have differing interests herein which require that counsel for each movant herein be duly accorded an opportunity to be heard on oral argument.

3. The cause presently before the Supreme Court of the United States requires consideration of several issues, each of some complexity, touching upon the jurisdiction of the District Court below and the failure of the complaint filed in the District Court, and the subject matter of this proceeding, to state a claim upon which relief can be granted. These can not be satisfactorily presented in an oral argument in a period of thirty minutes. Furthermore, the Respondent-Carrier seeks that its counsel emphasize to the Court certain of said issues and phases thereof which are peculiarly significant to it in its capacity as employer. Similarly, the Respondent-Railroad Brotherhood seeks that its counsel emphasize to the Court other issues and phases thereof which are peculiarly significant to it in its capacity as a labor union. An opportunity should be accorded both respondents to be heard on oral argument and that reasonably ample time should be accorded to each respondent.

Wherefore, the premises considered, respondents pray that this cause be removed from the summary calendar and placed upon the court's calendar for hearing and con-

sideration and that oral argument of one hour on each side be permitted under Rule 44 (4) of this Court.

Dated October 7, 1957.

.....

DAN M. WELCH,
Attorney, Missouri-Kansas-Texas Railroad Company, Denison, Texas.

.....

CARROLL J. DONOHUE,

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I certify that I served three copies of the foregoing on J. Lee Rankin, Esq., Solicitor General, George Cochran Doub, Esq., Asst. Attorney General, Samuel D. Slade, Esq., and John G. Langblin, Jr., Esq., Attorneys, Department of Justice, Washington 25 D. C., by depositing same, postage prepaid, in the United States Mail this 7th day of October, 1957, certified mail, return receipt requested.

.....

Carroll J. Donohue.

TURN TO NEXT CARD

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENT TO BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

(Legislative History)

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In the

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OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY,

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENT TO BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

(Legislative History)

To the Supreme Court of the United States:

During the argument of this case on January 27, 1958, counsel for respondent Missouri-Kansas-Texas Railroad Company requested and was granted leave to file this supplement to its brief, setting forth the legislative history to which such counsel referred.

Selective Service Act of 1948

The Selective Service Act of 1948 originated in two bills, S. 2655 and H. R. 6401, in the 80th Congress, Second Session.

Section 9 (a), (b), (c) (1), (c) (2), and (d) of S. 2655, relating to separation from service and reemployment rights, as that bill passed the Senate[1] on June 10, 1948, read as follows:

> "Sec. 9. (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) or 4(c) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the armed forces under this title for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title, each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position)[2] in the

[1] Congressional Record, 80th Congress, Second Session, Volume 94, Part 6, page 7681; S. 2655 as it passed the Senate.

employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor

in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of

absence in effect with the employer at the time such person was inducted into such forces, and shall not be laid-off or discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b) or subsection (c)(1)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prose-

cution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action." (Emphasis supplied.)

Section 8 (a), (b), (c), (d), and (e) of H. R. 6401, relating to separation from service and reemployment rights, as that bill passed the House[2] on June 18, 1948, read as follows:

"Sec. 8. (a) Any person inducted into the armed forces under this act for service, who, in the judgment of those in authority over him, satisfactorily completes his period of service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of service, which shall include a record of any special proficiency or merit attained. The Secretaries of Army, Navy or Air Force shall furnish to the Selective Service System hereafter established a report of separation for each person separated from active duty. In addition, each such person who is inducted into the armed forces under this act for service shall be given a physical examination upon separation and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate,

[2]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8695-8696, 8699, 8829.

(2) is still qualified to perform the duties of such position, and (3) makes written application for reemployment within 90 days after he is relieved from such service or from hospitalization continuing after discharge for a period of not more than 1 year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person shall be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer or his successor in interest shall restore such person to such position, or, if such position no longer exists, to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay.

(c) If any such person is not qualified to perform the duties of such position by reason of disability sustained during such period of service, but is qualified to perform the duties of some other position, then, in the case of paragraphs (A) and (B) of subsection (b), he shall [and in the case of paragraph (C) of subsection (b) it is hereby declared the sense of Congress that he should] be employed at such other position as may provide the nearest possible similarity in seniority, status, and pay.

(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions*, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority *to which he would have been entitled had he been working for the employer during his period of service in the armed forces*, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer, and shall not be discharged from such position without cause within 1 year after such restoration.

(e) In case any private employer fails or refuses to comply with the provisions of *subsection (b), subsection (c), or subsection (d)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of

any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party to any such action." (Emphasis supplied.)

After passage of H. R. 6401, the House vacated the proceedings and tabled that bill for consideration of S. 2655.[3]

The House amended S. 2655 by striking everything after the enacting clause and substituting therefor the language of H. R. 6401 as that bill passed the House, including the above quoted provisions which were renumbered Section 9 (a), (b), (c), (d), and (e).[4]

The Senate refused to concur in the House amendment and conferees were appointed.[5] The conferees submitted Conference Report No. 2438, reading in part as follows:[6]

"The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2655) to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes, having met, after full

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[3]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, page 8830.

[4]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8734, 8737-8738, 8829.

[5]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8741, 8823, 8830, 8995.

[6]Conference Report No. 2438, pages 11-13, 80th Congress, Second Session; Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8996, 9253, 9256-9257.

and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

* * * * *

Separation from Service; Reemployment Rights

SEC. 9. (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the armed forces under this title for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title, each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1)

receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person *shall*—

(i) if still qualified to perform the duties of such position, *be restored* to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, *be restored* to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person *shall*—

(i) if still qualified to perform the duties of such position, *be restored* by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of

any other position in the employ of such employer or his successor in interest, *be restored* by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the *sense of the Congress* that such person *should*—

(i) if still qualified to perform the duties of such position, *be restored* to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, *be restored* to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall* be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, *shall* be so restored without

loss of seniority, *shall* be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and *shall* not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the *sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b) or subsection (c)(1)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employers' unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any

person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action." (Emphasis supplied.)

The Managers on the Part of the House (House Conferees) submitted a statement to accompany Conference Report No. 2438, "in explanation of the effect of the action agreed upon by the conferees". The portion of that statement relating to "reemployment rights," reads in part as follows:[7]

"The Senate bill provided that persons completing their periods of service under the Act and securing restoration to their former positions in accordance with the terms of the Act should be restored without loss of seniority. The bill contained a declaration by the Congress to the effect that persons so restored should be restored in such manner as to give them the status in their employment which they would have enjoyed if they had continued in their employment continuously. * * *.

The House bill provided that those restored to positions pursuant to the terms of the Act should be en-

[7] Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 9253, 9267-9268; Conference Report No. 2438, pages 44, 49-50, 80th Congress, Second Session.

titled to all promotions, increases in pay, vacation rights, and accumulations of seniority to which they would have been entitled if they had been working in their old positions during their periods of service. * * *

The conference agreement adopts the language of the Senate bill with respect to reemployment rights * * *".[8]

Both the Senate and House agreed to the conference report and S. 2655, as so amended, became Public Law No. 759.[9] (United States Code, Title 50, Appendix, Sections 451-471.)

From the foregoing, it will be noted that Section 8(d) of H. R. 6401, and Section 9(d) of S. 2655 as amended in the House, provided that a returning veteran "*shall* be entitled to all promotions * * * to which he would have been entitled had he been working for the employer during his period of service in the armed forces" (emphasis supplied) and that Section 8(e) of H. R. 6401, and Section 9(e) of S. 2655 as amended by the House, vested in the Federal Courts power to enforce that provision; that the conferees rejected those House provisions; that the conferees adopted the mandatory language of Section 9(b)(B)(i) that a re-

[8]There were two exceptions: (1) there was eliminated the provision of the Senate bill authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and restraining of veterans; and (2) there was adopted the provision of the House amendment deleting the prohibition against lay-offs of restored veterans, Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, page 8699.

[9]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8999 and 9277, Volume 94, Part 8, pages 9353, 9354, 9355, 9356, 9363.

turning veteran "*shall*" be restored to his position or to a position of like seniority, status, and pay; that the conferees adopted the mandatory language of Section 9(c)(1) of S. 2655 that such veteran "*shall*" be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, "*shall*" be so restored without loss of seniority, "*shall*" be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and "*shall*" not be discharged from such position without cause within one year after such restoration; that the conferees adopted the precatory language of Section 9(c)(2) of S. 2655, which declared it to be the "*sense of the Congress*" (emphasis supplied) that a returning veteran "*should*" be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment; and that the conferees expressly limited the powers of the Federal Courts to enforcement of the mandatory provisions of Section 9(b) and Section 9(c)(1), thereby denying them the power to enforce the precatory provisions of Section 9(c)(2). That such action was deliberate is also shown by the legislative history of the 1956 amendment of Section 9(d).

1956 Amendment of Section 9(d)

Section 9(d) was amended in 1956 by S. 3307, 84th Congress, Second Session. That bill, as introduced on February 28, 1956, read as follows:[10]

> "*Be it enacted, etc.*, That section 9(d) of the Universal Military Training and Service Act, as amended, is amended by striking out 'subsection (b) or subsection (c)(1)' and inserting in lieu thereof 'this section'.
>
> "Sec. 2. The amendment made by the first section of this act shall take effect as of June 19, 1951".

S. 3307 was referred to and reported by the Committee on Armed Services, with the following amendment:[11]

> "Strike out all after the enacting clause and insert in lieu thereof the following:
>
> That section 9(d) of the Universal Military Training and Service Act, as amended, is amended by striking 'or' immediately following 'subsection (b)', inserting a comma in lieu thereof, striking the comma immediately following 'subsection (c)(1)' and inserting in lieu thereof 'or subsection (g)'.
>
> Sec. 2. The amendment made by the first section of this Act shall take effect as of June 19, 1951".

The committee report contains this explanation of the amendment:[12]

> "*The bill as introduced conceivably could have been interpreted to make section 9(c)(2)* of the Universal

[10] Congressional Record, 84th Congress, Second Session, Volume 102, Part 3, page 3451.

[11] Senate Report No. 2087, page 1, 84th Congress, Second Session.

[12] Senate Report No. 2087, page 1, 84th Congress, Second Session.

Military Training and Service Act *enforceable in the Federal courts.* Since *this result was not intended,*[13] the amendment is somewhat less broad in that it extends Federal jurisdiction and the assistance of the United States attorney in the enforcement of the provisions contained in section 9(g) of the Universal Military Training and Service Act." (Emphasis supplied.)

As thus amended, Section 9(d) was changed to read in part as follows:

"(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b), subsection (c)(1) or subsection (g),* the district court of the United States for the district in which such private employer maintains a place of business shall have power * * * specifically to require such employer to comply with *such provisions* * * *." (Emphasis supplied.)

This is the language of Section 9(d) today, *United States Code, Title 50, Appendix, Section 459(d).* As in 1948, the provisions of Section 9(c)(2) are not enforceable.

Respectfully submitted,

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[13]The committee report, under the heading "Legislative Background," also stated: "Persons inducted for 2 years of training and service are protected by sections 9(b), 9(c)(1), and 9(d)." No reference was made to section 9(c)(2). Senate Report No. 2087, page 2, 84th Congress, Second Session.

Certificate of Service

I hereby certify that I have today served a copy of the foregoing supplement to brief of respondent Missouri-Kansas-Texas Railroad Company upon each of the following persons: J. Lee Rankin, Solicitor General, Washington 25, D. C.; Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri; Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio; Richard R. Lyman, 741 National Bank Building, Toledo 4, Ohio; and Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C.; by mailing a copy to each of them by first-class mail, properly addressed to each of them, with postage prepaid.

Dated February 4, 1958.

/s/ M. E. CLINTON

M. E. CLINTON
Of Counsel for Respondent,
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Railroad Company.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

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Dated at Toledo, Ohio this 24th day of October, 1957.

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BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

Preliminary Statement — Interest of the Amicus Curiae.

The Railway Employes' Department, AFL-CIO, on whose behalf as *amicus curiae* this brief is filed, is composed of the following standard national and international railway labor organizations representing, for purposes of collective bargaining under the Railway Labor Act, the so-called shop-craft employees of the great majority of railroads in the United States:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Brotherhood Railway Carmen of America
International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers,

Helpers, Roundhouse and Railway Shop Laborers

Collective bargaining for these organizations is conducted on a federated basis by said Railway Employes' Department operating through "System Federations" on the properties of the respective carriers, agreements negotiated by such System Federations providing, among other things, for seniority systems and seniority rights of employees in the various crafts represented. In the fulfillment of its representative function the Railway Employes' Department and its System Federations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Since the enactment of the Selective Training and Service Act of 1940 and subsequent legislation establishing legally enforceable reemployment rights for persons called from private employment to perform military service, numerous questions have arisen, and a great amount of litigation has ensued, with respect to the particular job status and seniority rights to which the returning veteran is entitled. Such questions have been of particular importance in the railroad industry, with its organzation of employees in separate crafts and classes, and confinement of seniority rights to crafts and sub-crafts, and particular points of employment.

Particularly fruitful of continuing litigation have been the claims of returning veterans to be promoted or transferred to positions different from those which they left to enter the armed forces, in either the same or different crafts, and to retroactive or antedated seniority in the new positions following such promotions or transfers. Such claims, and the continuing litigation, necessarily give rise to uncertainty and insecurity, not to mention dissension, within the employee groups affected, and this situation can

only be alleviated by the development of well established principles governing the application of the statutory reemployment provisions to these questionable situations.

In a number of cases in whch it has participated, the Railway Employes' Department has taken the view that while the returning veteran must be restored to his former position with full accumulation of seniority credit for the period of his absence in the armed forces, the statutory provisions did not require his restoration to a new or different position, with retroactive seniorty therein, simply on the theory that he could, would, or might have been able to obtain such position had he not been absent. Such view was followed by the lower Federal courts with almost complete unanimity until this Court's *per curiam* reversal of the decision of the Court of Appeals for the Third Circuit in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960. Though we do not agree that it warrants such construction, the *Diehl* decision has been interpreted by Government counsel representing the returned veterans as a reversal of this previous line of cases, and a resurgence of litigation on this question has followed, with resultant conflicting decisions of the courts.

While opposed to the broad scope thus sought to be attached to the *Diehl* decision, the Railway Employes' Department, as collective bargaining representative of both veteran and non-veteran railroad employees, is equally interested in having these issues authoritatively decided. The present case presents both the occasion and the opportunity for this Court to do so.

Of some additional concern is the question raised here with respect to the right of the returning veteran in the railroad industry to submit his grievances to the Federal courts without resort to the National Railroad Adjustment

Board, and a portion of our discussion will be directed to that point.

Summary of Argument

While the Universal Military Training and Service Act of 1951 requires the returning veteran to be restored to his former position without loss of seniority, it does not require his retroactive restoration to a new or different position, in a completely separate and distinct seniority category, on the theory that he would or might have obtained such position had he not been absent. The statutory requirement of restoration "without loss of seniority" requires accumulation of seniority credit during the period of miltary service, but such accumulation applies only to the position which the veteran left and to which he is required to be restored. And irrespective of any question of the veteran's right to a retroactive reconstruction of a progression of job transfers or promotions which he might have had a contract right to pursue had he not been absent, it is clear that he has no legally enforceable claim to different or better positions which he might or even probably would have been awarded, at the discretion of his employer, such claims resting in the realm of speculation rather than legal right.

Disputed questions of the interpretation and application of collective bargaining agreements in the railroad industry rest within the exclusive jurisdiction of the National Railroad Adjustment Board, and that jurisdiction was not impaired by the Selective Training and Service Act of 1940 and ensuing statutes creating veterans' reemployment rights. Status as a veteran does not give a railroad employee the right to by-pass the National Railroad Adjustment Board and resort initially to the courts for determination of a claim based upon disputed questions of interpretation or application of collective bargaining agreements.

ARGUMENT

I. THE STATUTE DOES NOT REQUIRE RESTORATION TO A PROMOTED POSITION IN A SEPARATE AND DISTINCT SENIORITY CATEGORY SIMPLY BECAUSE THE VETERAN MIGHT HAVE ACHIEVED IT HAD HE NOT BEEN ABSENT IN MILITARY SERVICE.

The Universal Military Training and Service Act of 1951 (65 Stat. 75, U.S.C. App., Sec. 451 et seq.), the statute upon which this action is based, requires that in the case of a veteran who left a position, other than temporary, in the employ of a private employer, he shall be restored "*to such position* or to a position of like seniority, status and pay". (Sec. 9 (b) (B) (i); emphasis supplied.) It is further provided that any person who is restored to a position pursuant to the foregoing provisions "shall be considered as having been on furlough or leave of absence" and "shall be so restored without loss of seniority". (Sec. 9 (c) (1).) The same provisions were contained in the Selective Training and Service Act of 1940 (50 U.S.C. App., Sec. 301 et seq.), and the subsequently enacted statutes conferring reemployment rights upon veterans.

Petitioner in the instant case left, and was restored to a position as a Group 2 Clerk, and was given accumulated seniority credit in that position for the period of his absence. Immediately following his reemployment, however, he obtained a position as a Group 1 Clerk, in a completely separate and distinct seniority category from the Group 2 classification, and the purpose of the suit is to require that he be given retroactive or antedated seniority status in Group 1 corresponding to that which he says he would have obtained had he not been absent in military service.

The parties here are in dispute as to whether, under the applicable collective bargaining agreements, petitioner

would certainly have achieved the Group 1 position as a matter of contract right, or might have achieved it as a matter of probability only (which was the view of the Court of Appeals below, 240 F. (2d) 8). In the view we take of the statute, we think that under either circumstance the petitioner must fail; but that in any event no legally enforceable rights such as those here asserted may be based upon "probabilities", requiring speculation as to what would or might have been.

(a) Authorities Prior to Diehl Decision.

The position taken by the petitioner is not novel. Similar contentions were urged under the 1940 and subsequent statutes, and were rejected by the courts in almost every instance prior to this Court's decision in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960.

Many of these decisions have been cited and discussed at length in the briefs of the parties herein, and we shall not burden the Court with any lengthy analysis of the authorities. Those cases involved various claims for promotions, vacation rights, higher positions on step-rate pay scales, and other benefits which the veteran said he would or could have obtained had he not been absent, but which he could not obtain as rights and incidents of his old position, even with full accumulated seniority credit for the period of his military service.

For purposes of this case, however, it should be pointed out that the decisions may be divided into two categories, i.e., (1) those cases where the claimed status would have been achieved automatically or as a matter of contractual right, and (2) those in which the veteran could show at most a "high probability" that he would have achieved the sought-for status.

Illustrative of the first category are the following cases:

Bostian v. Seaboard Airline R. Co., 211 F. (2d) 867 (C.A. 4).

Spearmon v. Thompson, 167 F. (2d) 626 (C.A. 8); cert. den., *sub nom. Delozier v. Thompson*, 355 U.S. 886.

Seattle Star, Inc., v. Randolph, 168 F. (2d) 274 (C.A. 9).

Trischler v. Universal Potteries, Inc., 171 F. (2d) 707 (C.A. 6), affirming 78 F. Supp. 609.

Addison v. Tennessee Coal, Iron & R. Co., 204 F. (2d) 340 (C.A. 5).

Fries v. Pennsylvania R. Co., 195 F. (2d) 445 (C.A. 7).

Brown v. Watt Car & Wheel Co., 182 F. (2d) 570 (C.A. 6), cert. den. 340 U.S. 875.

Dougherty v. General Motors Corp., 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956.

Foster v. General Motors Corp., 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937.

Dwyer v. Crosby Co., 167 F. (2d) 267 (C.A. 2).

Siaskiewicz v. General Motors Corp., 166 F. (2d) 463 (C.A. 2).

In the second category, the "high probability" cases, are the following:

Hewitt v. System Federation No. 152 etc., 161 F. (2d) 545 (C.A. 7).

Lesher v. P. R. Mallory & Co., 166 F. (2d) 983 (C.A. 7).

Gregory v. Louisville & N. R. Co., 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903.

Raulins v. Memphis Union Station Co., 168 F. (2d) 466 (C.A. 6).

Rose v. Texas & N.O.R. Co., 171 F. (2d) 458 (C.A. 5).

In most of the cases cited above, the courts had recognized the appropriateness of the so-called "escalator principle" (*Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275), or "continuous employment" test (*Oakley v. Louisville & N.R. Co.*, 338 U.S. 278), as descriptive of the veteran's right to continue to accumulate seniority during his military absence (even though applicable agreements might call for interruption of seniority credit during furlough or leave of absence). But the decisions confined such right to seniority in the position, or seniority category, which the veteran had left and to which the statute required him to be restored.

(b) The Diehl Case.

It is the claim of the petitioner that all of the foregoing authorities, whether falling in the contract right or high probability category, and whether involving seniority rights, promotions, vacation pay eligibility, step-rate pay systems, or other employment benefits, have in effect been overruled by this Court's decision in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960. (See petitioner's brief, p. 20, note 11, enumerating cases said to be "irreconcilable" with the *Diehl* case.) If that is true, then we can think of no other instance in which such a large body of authority has been reversed without explanation or statement of controlling principles, by a one-sentence opinion expressly predicated on the facts of the particular case, and where those facts were completely different from those of the cases said to have been reversed.

However we do not subscribe to the principle that the

cases cited are thus "irreconcilable" with the *Diehl* decision. Indeed, consideration of the facts of the *Diehl* case will show the complete lack of controlling effect upon the questions here presented.

Diehl, like the three successful plaintiffs in the *Spearmon* case, *supra*, had already been promoted prior to entering the armed forces. Continuous employment in the position he left to enter the armed forces, and to which he was restored, would have resulted in the seniorty status sought by Diehl, so that it may be said that the case in effect simply involved a denial of his right to continue to accumulate seniority during his absence, and to be restored "without loss of seniority" upon his return. No *retroactive* seniority, in a different position and seniority category than that in which he had previously been employed, was involved in the *Diehl* case. And, of importance with reference to the instant case, no speculative factual elements were involved in determining what Diehl's seniority would have been had he not been absent. Diehl was already on the seniority "escalator" involved, when he entered the armed forces (even though definition of its contractual attributes was deferred until long after his return and reemployment).

A searching analysis of the *Diehl* decision with precise reference to the very issues involved here, appears in the article by Professor Herbert L. Sherman, Jr., entitled "Seniority and Promotion Rights of Reemployed Veterans" at 17 Pitt. L. Rev. pp. 20-41 (1955). Because we believe that article, *in toto*, to be completely meritorious of the Court's attention in connection wth the disposition of this case, we shall not attempt paraphrasing or synopsis of the entire discussion here. A few short quotations from the article will, however, serve to demonstrate its relevance.

After detailed discussion of the facts of the *Diehl* case and the arguments presented to the Court, Professor Sherman says:

"It is not surprising, therefore, that the Supreme Court found it possible to dismiss this case in a brief per curiam decision. But what did it actually hold? Simply that a veteran is entitled to count military service toward his seniority credit, where the seniority ranking of incumbents of the job to which the returning veteran is restored is dependent upon routine completion of a certain number of work-days, so that his position on the 'seniority escalator' will not suffer because of service in the armed forces. Once the case is considered as presenting only that narrow issue, the result is easy under the *Fishgold* and *Oakley* cases. (pp. 27-28.)

. . . . .

"Insofar as the Supreme Court merely applies its 'continuous employment' standard to the question of measuring the seniority credit of a veteran, it is simply and properly giving greater weight to the more specific Congressional language ('without loss of seniority') than if is to the more general statutory language ('shall be considered as having been on furlough or leave of absence'). If there is any conflict between these two provisions, the Court, under well-accepted principles of statutory construction, must consider the more specific provision as controlling." (P. 29.)

. . . . .

"In areas other than seniority credit and automatically attendant benefits, the 'furlough or leave of absence' provisions should be considered as part of the 'continuous employment' standard. It would seem clear that an employee may remain continuously in the employment of his employer, yet be on furlough or leave of absence. The concepts are not inconsistent. Where questions other than arithmetical calculation of seniority credit or automatic layoffs and promotions based solely on length of service are involved, the courts may properly consider the furlough or leave of absence provisions of the employer as a basis for denying benefits claimed by the veteran. . . ." (pp. 29-30.)

Further discussing the specific questions involved in

this case, Professor Sherman refers to the principles developed in the *Bostian, Addison,* and *Raulins* cases, cited above, and *Special Service Company v. Delaney,* 172 F. (2d) 16 (C.A. 5), and concludes that "Certainly, the *Diehl* case, which did not require any ruling on the question of a right to a promotion to a different and higher job, cannot be said to overrule these principles." (pp. 31-33.)

Although the *Diehl* case is thus completely distinguishable from the instant one, on both its factual situation and the controlling statutory provisions, the Government's sweeping claims as to its import have resulted in conflicting decisions in subsequent cases. Here the court below in effect adopted the viewpoint espoused by Professor Sherman. The Court of Appeals for the Fifth Circuit, in *Poore v. Louisville and Nashville Railroad Company,* 235 F. (2d) 687, seemed also to have done so; but then, in *Moe v. Eastern Air Lines, Inc.,* 246 F. (2d) 215 (petition for certiorari pending before this Court, No. 419, October term, 1957), seemed to take the opposite view. The Court of Appeals for the Sixth Circuit, in *Mann v. Crowell-Collier Publishing Co.,* 239 F. (2d) 699, appears to have considered its previous line of decisions reversed by the *Diehl* case. But the *Diehl* case was distinguished, and the previous line of authorities adhered to, in *Sularz v. Minneapolis, St. P. & S.S. M.R.R.,* 148 F. Supp. 83 (D.C. Minn., 1956).

While of the view that the previous authorities which we have cited need not be considered as reversed by the *Diehl* case, and that the decision of the court below should be affirmed, we believe that it is of vital importance that this confused state of the authorities be clarified, and the *Diehl* decision placed in its proper perspective.

(c) Lack of Support for Petitioner's Claim in the Statute or its Legislative History.

While, as has been pointed out, the Act requires restoration of the veteran to his former position, or one of like seniority, status and pay without loss of seniority, and while these provisions have been construed to require accumulation of seniority credit as if the veteran had been continuously employed, irrespective of any agreement provisions conditioning accrual of seniority upon presence on the job, there is no language in the statute which purports to give the returning veteran rights in a position and seniority category completely separate and distinct from that which he left to enter the armed forces.

While petitioner invokes Section 9 (c) (2) of the Universal Military Training and Service Act as a Congressional endorsement of his position, quite the contrary is true.

While the other portions of Section 9 are substantially a carry-over from the language of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App., Sec. 301 et seq.), paragraph 9 (c) (2) was added at the time of adoption of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App., Sec. 451, et seq.), the immediate precursor of the present statute. The legislative history of this addition is enlightening.

When the 1948 Act was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions," as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed

forces, *shall be entitled to all promotions*; increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces.* (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provision:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Selective Service Act of 1948, Section 9 (c) 2; emphasis supplied. This language remains unchanged in the present Act.)

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government and its political subdivisions and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such a position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia; such person *shall* * * * be restored to such position * * *.

"(B) if such position was in the employ of a private employer, such person *shall* * * * be restored * * * to such position * * *.

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress* that such person *should* * * * be restored to such position * * *". (Emphasis supplied.)[1]

Furthermore, it should be noted that in Section 9 (d) of both the 1948 and present Acts, providing for court action to enforce the obligations of the statute, no provision is made for enforcement of Section 9 (c) (2), the precatory "sense of Congress" clause. Paragraph (d) reads in part as follows:

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) *or subsection (c) (1)*, the district court * * * shall have the power * * * to require such employer to comply with such provisions. * * *." (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express granting of the rights here asserted by appellant, the substitution therefor of language which on its face does not require such treatment of veterans, and the provision for enforcement of Sections 9 (b) and 9 (c) (1) *but not* 9 (c) (2), all clearly demonstrate that Congress did not wish to create any such rights as appellant asserts in a legal, or mandatory, sense, but was content with the state-

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[1]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act. See *Rutherford v. City of Nashville*, Tenn. Ct. of Appeals, March 27, 1948, 21 L.R.R.M. 2618, 14 Labor Cases (C.C.H.) No. 64,413, and *McLaughlin v. Retherford*, 207 Ark. 1094, 184 S.W. 2d 461 (Ark. Sup. Ct., Dec. 18, 1944), holding that employees of states or political subdivisions thereof possess no reemployment rights under the Federal statute. That the present Act "contains no mandatory provisions covering such employees" is conceded in the question and answer "Reemployment Rights Handbook", October, 1954, prepared by the Bureau of Veterans' Reemployment Rights in cooperation with the Office of the Solicitor, United States Department of Labor, Washington, D.C. (See Question No. 28, p. 18.)

ment of a policy the application of which it desired but did not require.[2]

In view of the language of the statute and its legislative background, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, something which Congress has expressly refused to grant.

(d) Unenforceability of Speculative Claims based on "High Probability" of Promotion.

Although there appears to be some disagreement among the parties to this case as to whether petitioner could have asserted a contractual right to demand and receive the Class 1 Clerk's position which is the subject of this litigation, the court below found that no such right existed, and it appears to us that the case falls within the category of so-called "high probability" cases. Whatever else the *Diehl* case may be claimed to stand for, it does not support a speculative claim of this sort.

The high probability type of claim originated with the case of *Hewitt v. Chicago, South Shore and South Bend Railroad Company*, decided July 23, 1946, by the United States District Court for the Northern District of Indiana, and unofficially reported at 18 L.R.R.M. 2262. In that case the returning veteran who had been a car cleaner claimed the right to a position as carman helper, with retroactive seniority to the time when he claimed he would have received the promotion had he not been in the armed forces. The District Court found that although car cleaners had no contractual right to such promotions in order of their car

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[2] A similar conclusion is reached by Professor Sherman, in the law review article noted above, after a more detailed analysis of the effect of Section 9 (c) (2).

cleaner seniority, Hewitt's claim should be sustained on the ground that there was a "high probability" of his having been promoted in seniority order had he not been in the armed forces. The following excerpt from the court's oral opinion illustrates the reasoning which was applied:

> "If it is in the speculation area, I should rule against Hewitt; if it is a matter of certainty, I should rule for him. But the problem is not that easy. It seems to me the evidence lends itself to a high probability that he would have been promoted to the job of car helper on that date." (18 L.R.R.M: 2263.)

On April 29, 1947, this holding was reversed by the Court of Appeals for the Seventh Circuit, in the case of *Hewitt v. System Federation No.* 152, *etc.*, 161 F. (2d) 545. Since that time the courts in numerous cases have uniformly rejected the "high probability" claims of returning veterans. A few of these cases were noted above in our citation of authorities prior to the *Diehl* decision. Insofar as we are aware, the only previous instance in which a review by this Court was sought in such a case was in *Gregory v. Louisville & N. R. Co.*, 191 F. (2d) 856 (C.A. 6); cert. den. 343 U.S. 903. There would thus appear to be complete uniformity among the federal courts since the decision in the *Hewitt* case, *supra*.

We submit that complete chaos would result if the processes of litigation and adjudication were to be extended to such matters as the degree of probability of an employee's having been selected for promotion in the exercise of managerial discretion at some past time, and his merit, ability and qualifications, relative to those of his fellow employees, in the eyes of the management representatives who would have been called upon to exercise such discretion. Such matters, as the courts have found, rest within the realm of speculation, not decision, and cannot give rise to legally enforceable rights.

II. EXCLUSIVE JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD OVER INTERPRETATION AND APPLICATION OF RAILROAD COLLECTIVE BARGAINING AGREEMENTS.

As an additional ground for affirmance of the decision below, the respondent Brotherhood has urged lack of jurisdiction of the District Court by virtue of the National Railroad Adjustment Board's exclusive jurisdiction over the subject matter of the case. While, as indicated above, we do not believe that decision of this question is necessary to an affirmance of the decision below, the question raised is of such obvious concern to the Railway Employes' Department that its position should not go unstated.

Without attempting to inject ourselves into the merits of the claims of the parties herein, on the question of this petitioner's rights under the particular collective bargaining agreements involved, we submit that it is indeed well established, since this Court's decision in *Slocum v. D.L. & W.R.R. Company*, 339 U.S. 239, that the Adjustment Board possesses exclusive jurisdiction over the interpretation and application of collective bargaining agreements in the railroad industry. The final and binding nature of the Board's determination of such matters was further pointed up in *Brotherhood of R.T. v. Chicago R. & I. R. Co.*, ... U.S. ...., 1 L. Ed. (2d) 622, where the Board proceedings were classified as statutory compulsory arbitration.

The statutes creating veterans' reemployment rights did not purport to rewrite collective bargaining agreements, or to create contractual employment rights, but rather were designed to restore the veteran to his rights under existing contracts. As this Court observed in the *Fishgold* case, *supra*, there is no suggestion that Congress intended to sweep aside existing seniority systems; instead it gave the veteran protection within their framework. We submit that it follows that neither did Congress intend to inter-

fere with the exclusive machinery it had previously established to settle disputes over the interpretation of the collective agreements.

Accordingly, it seems clear that where a railroad employee who happens to be a veteran wishes to prosecute a claim based upon the agreements governing his craft, the Board's jurisdiction is exclusive.

This is not to say that a veteran's claim based upon an alleged violation of the Universal Military Training and Service Act, and asserting benefits by virtue of that Act rather than under an agreement, is not properly presented to the courts.

But finally, where the claim, though based on the Act, must stand or fall on a disputed question of contract interpretation, it would seem that the court should at the least hold the case in abeyance pending submission of the dispute over contract interpretation to the Adjustment Board, and should thereafter apply the Act in the light of that interpretation. (*Order of Railway Conductors v. Pitney*, 326 U.S. 561.)

CONCLUSION

Petitioner's claim is unsupported by either the language or the legislative history of the statute on which it is based, and similar claims were rejected by the great weight of the authorities prior to this Court's decision in the *Diehl* case. Though completely distinguishable on its facts, and involving application of different statutory requirements, sweeping claims as to the scope of the *Diehl* decision have resulted in conflicting interpretations of the law governing veterans' reemployment rights. We have pointed out the importance of having these conflicts resolved, and the present case affords the occasion and opportunity to do so.

We have further shown the lack of merit in the attempted legal enforcement of claims resting in the category of probabilities rather than contractual rights, and the confusion that would attend extension of the processes of litigation and adjudication to such speculative matters.

And finally, we have pointed out that the veterans' reemployment statutes were not designed to impair the exclusive jurisdiction of the National Railroad Adjustment Board over the interpretation and application of collective bargaining agreements in the railroad industry, or to open the courts to claims based upon such agreements merely because of the employee's status as a veteran.

Respectfully submitted,

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Dated at Toledo, Ohio this 24th day of October, 1957.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Employes' Department, AFL-CIO, amicus curiae, do hereby certify that on the .... day of October, 1957, I served the attached brief of amicus curiae upon all parties of record herein by depositing copies hereof in the United States mails, via airmail, postage prepaid, addressed to J. Lee Rankin, Esq., Solicitor General; George Cochran Doub, Esq., Assistant Attorney General; Samuel D. Slade, Esq., and John G. Laughlin, Jr., Esq., Department of Justice, Washington (25) D.C., attorneys for petitioner; Wayne R. Howell, Esq., M. E. Clinton, Esq., and Dan M. Welch, Esq., Barrett Building, Denison, Texas, attorneys for Respondent Missouri-Kansas-Texas Railroad Company; and to Sam Elson, Esq., Carroll J. Donohue, Esq., attorneys for Respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 506 Olive Street, St. Louis 1, Missouri.

Richard R. Lyman